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In The

Supreme Court of the United States

October Term, 1978

No. 78-1197

EDWARD McGRATH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
Table of Cases	*ii*
Opinion Below	1
Jurisdiction	2
Finality of Judgment	2
Constitutional Provisions and Statutes Involved	3
Question Presented — Can a grand jury witness be convicted of criminal contempt based upon questions derived from unlawful eavesdropping — or does a witness' evasive answers to certain questions attenuate the taint?	3
Statement of Facts	3
Reasons for Granting the Writ — The Fourth Amendment bars petitioner's conviction of criminal contempt because it was based upon questions derived from unlawful eavesdropping and his decision to answer the questions, even if evasively, does not attenuate the taint.	4
Conclusion	9
Appendix	
A. Opinion of the State of New York Court of Appeals	A-1
B. Opinion of the Appellate Division of the State of New York, First Judicial Department	B-1
C. Opinion of the Supreme Court of the State of New York, County of New York (Roberts, J.)	C-1
D. Constitutional Provisions and Statutes Involved	D-1

TABLE OF CASES

	Page
Brown v. Illinois, 422 U.S. 590 (1975)..	8
Crews v. United States, 389 A.2d 277 (D.C. Ct. App. 1978)..	8
Droback v. United States, 509 F.2d 625 (9th Cir. 1974).	6
Gelbard v. United States, 408 U.S. 41 (1972).	5
In re Grand Jury Proceedings [United States v. Worobyzt], 522 F.2d 196 (5th Cir. 1975).	6
In re Millow, 529 F.2d 770 (2d Cir. 1976)	6
In re Persico, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974).	6
Nardone v. United States, 308 U.S. 338 (1939).	7
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).	5
United States v. Calandra, 414 U.S. 338 (1974).	5
United States v. Ceccolini, U.S. , 98 S.Ct. 1054 (1978).	7
United States v. Morales, 566 F.2d 402 (2d Cir. 1977)..	6
United States v. Scios, F.2d (D.C. Cir., July 21, 1978, No. 75-1619).	8
Weeks v. United States, 232 U.S. 383 (1914)	5
Wong Sun v. United States, 371 U.S. 471 (1963)	5

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioner, EDWARD McGRATH, prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals entered on November 30, 1978.

Opinion Below

The opinion of the Court of Appeals, dated November 30, 1978, is not yet reported, but is printed in Appendix A. The opinion of the Appellate Division, First Judicial Department is reported at 57 A.D.2d 405, 394 N.Y.S.2d 885 (1st Dept. 1977), and is reprinted as Appendix B. The trial court's decision is reported at 86 Misc.2d 249, 380 N.Y.S.2d 976 (Sup. Ct. 1976), and is reprinted as Appendix C.

Jurisdiction

Petitioner was found guilty in the New York Supreme Court, of one count of criminal contempt in the first degree in violation of New York Penal Law § 215.51. On September 20, 1976 petitioner was sentenced to nine months imprisonment.

On May 31, 1977 the Appellate Division, First Judicial Department unanimously reversed the contempt conviction and dismissed the indictment, holding that a grand jury witness need not answer questions based on information obtained from illegal wiretapping.

On November 30, 1978, the New York Court of Appeals reversed the Appellate Division, holding that in a criminal contempt proceeding, the Fourth Amendment does not require the suppression of grand jury testimony rooted in illegal eavesdropping, because of attenuation.

Finality of Judgment

Although this case was remitted to the trial court, on a separate and unrelated ground, the issue we bring to this court is final. The decision of the New York Court of Appeals, holding that the Fourth Amendment did not preclude the use in petitioner's trial of questions derived from illicit electronic surveillance, is a conclusive judgment on this important federal question. No matter what the ultimate outcome of the retrial, the Fourth Amendment issue will remain unaffected, undiluted, and ineligible for relitigation in New York. *See Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469 (1978). *See also* Stern and Gressman, *Supreme Court Practice* 5th Ed. 1978) §§ 3.7-3.12.

This petition is seasonably filed within ninety days of the New York Court of Appeals final judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions and Statutes Involved

The constitutional provisions and statutes involved are contained in our Appendix D.

Question Presented

Can a grand jury witness be convicted of criminal contempt based upon questions derived from unlawful eavesdropping — or does a witness' evasive answers to certain questions attenuate the taint?

The Court has never considered this crucial constitutional question before.

Statement of Facts

On February 20, 1973, petitioner, who was 67 years old, appeared before a New York County grand jury and, after a grant of immunity, answered questions touching upon gambling and a variety of other offenses. Before testifying, petitioner was told that he would be asked questions derived from electronic surveillance. Upon request, he was taken before a judge, who after examining the eavesdropping orders, merely found they were sufficient on their face. He directed Mr. McGrath to return to the grand jury room and answer all relevant questions. Petitioner complied with the court order and answered, under protest, over one thousand questions. Thereafter, petitioner was indicted for giving evasive answers to a question about whether or not he discussed with another person the attempted execution of a witness in a federal bank robbery prosecution pending in New York City in 1970.

In advance of trial, petitioner moved to suppress the unlawfully acquired eavesdropping evidence used to interrogate him before the grand jury. Although the judge found that the questions petitioner answered were the product of illegally

conducted electronic surveillance, he denied the motion on the questionable theory that the taint was attenuated by petitioner's decision to answer the questions evasively. At petitioner's trial, the questions gained from the illicit eavesdropping were read to the jury over defense counsel's strenuous objection. Edward McGrath was convicted and sentenced to nine months in prison.

On appeal, the Appellate Division, First Department, reversed and dismissed the indictment holding:

> "It is well settled that '(a) Grand Jury witness need not answer questions based on information obtained as the result of illegal wiretapping (U.S. Code, Tit. 18, § 2515). Nor may the contempt power be used to compel such testimony or punish the witness for his silence. The claim of illegal wiretapping, if sustained, constitutes a defense" . . . (394 N.Y.S.2d at 888).

The Court of Appeals reversed the Appellate Division and held that petitioner's action in testifying before the grand jury constituted an act sufficiently independent of the illegal wiretap so as to dissipate "any taint flowing from the proscribed police conduct." In light of the Court of Appeals' drastic curtailment of the exclusionary rule, we turn immediately to the substantial reasons why the writ should be granted.

Reasons for Granting the Writ

I

The Fourth Amendment bars petitioner's conviction of criminal contempt because it was based upon questions derived from unlawful eavesdropping and his decision to answer the questions, even if evasively, does not attenuate the taint.

The sole question presented by this petition is whether a grand jury witness can be convicted of criminal contempt based upon questions derived from unlawful eavesdropping. The

determination of the New York Court of Appeals that a witness' evasive answers attenuates any taint conflicts with the rule commemorated in *Gelbard v. United States*, 408 U.S. 41 (1972). It also represents an abrupt departure from an unbroken line of cases, extending over a long stretch of this Court's history, holding, that the Fourth Amendment bars a conviction based upon unlawfully acquired evidence.*

More importantly, 18 U.S.C. § 2515 specifically enjoins, without exception, the use of illegitimate eavesdropping evidence both before a grand jury and in a criminal trial. Thus, the oddity of attenuation, with its Fourth Amendment genealogy, was erroneously applied by the New York Court of Appeals to a case governed by the strictures of § 2515. This critical difference between a Fourth Amendment claim and the protections of § 2515 was acknowledged in *United States v. Calandra*, 414 U.S. 338, 354, 355 n.11 (1974). Since the employment of electronic surveillance is reaching alarming proportions in this country, and is a continuing source of controversy in both our federal and state courts, this critical issue should be reviewed and resolved.

In the *Gelbard* case, this Court held in unmistakable language, that the purposes of § 2515 would be subverted if the victim of illegal eavesdropping can be asked questions derived from that unlawful source:

> "Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that § 2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents" (408 U.S. at 51).

Because of the urgency of a grand jury investigation, the

**Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Weeks v. United States*, 232 U.S. 383 (1914).

normal testing procedures used to challenge the legality of eavesdropping evidence must be suspended.* Thus, citizens called before grand juries are forced to disclose that which they may wish to keep private, even though, after a full hearing, it may be determined that they were not obliged to answer the tarnished questions. However, if a witness should ultimately be charged with responding in an unsatisfactory manner, his rights under § 2515 are resurrected. Since the presentation of the illegally obtained evidence was originally outlawed before the grand jury, the indictment should be dismissed.**

Even in the *Calandra* case, where the proof presented to grand jurors was obtained illegally through a search warrant, this Court held that the defendant could secure the "exclusion of the property and its fruits from being used as evidence against him in a criminal trial" (414 U.S. at 354 n.10). Petitioner attempted, unsuccessfully, to follow the dictates of *Calandra* by moving to suppress the proof gained directly from the illicit eavesdropping.

The doctrine that forbids the official "exploitation of a primary illegality" needs no scholarly vindictation. *Wong Sun*

United States v. Morales, 566 F.2d 402 (2d Cir. 1977); *In re Millow*, 529 F.2d 770 (2d Cir. 1976); *In re Grand Jury Proceedings [United States v. Worobyzt]*, 522 F.2d 196 (5th Cir. 1975); *Droback v. United States*, 509 F.2d 625 (9th Cir. 1974); *In re Persico*, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974).

**The Court of Appeals holding that the Fourth Amendment would be available to petitioner only if he flatly refused to answer all questions before the grand jury poses a real dilemma for counsel representing the witness. At this early stage of the proceeding, the supporting affidavits cannot be inspected, and thus counsel has no way of evaluating the validity of the wiretap warrant. *See Persico, supra.* Accordingly, a lawyer is faced with a dilemma from which there are only two exits — contempt or a waiver of his client's Fourth Amendment rights. If the witness refuses to respond to the questions and the wiretap orders turn out to be valid, he is automatically guilty of contempt. If on the other hand, he testifies and later learns the eavesdropping orders are invalid, he faces a claim of attenutation or waiver. No person should be made to assume such an unreasonable risk.

v. United States, supra. Since the lawlessness of the eavesdropping employed in this case has been adjudicated, the relevant federal and state statutes bar the use of that evidence before the grand jury and in the petitioner's trial.* This inexcusable breach of the provisions of the Fourth Amendment, as well as the federal and state statutes, cannot be tolerated and calls for immediate corrective action.

The Attenuation Claim

Even if the principle of attenuation applied to an eavesdropping case, the connection between the illegal interception here and the subsequent use of the poisoned evidence was not sufficiently diminished to "dissipate the taint". *Nardone v. United States*, 308 U.S. 338, 341 (1939). Accordingly, the prosecution cannot squeeze this case through the narrow proscenium of attenuation because the evidence used against the petitioner had no independent source. The toxic questions put to the petitioner were derived directly from the unlawful electronic monitoring. The decision to call him before the grand jury and confront him with the noxious evidence, was instigated by the illegal eavesdropping. Thus, there was absolutely no dilution or interruption of the flow of polluted proof.

The Court of Appeals' reliance upon *United States v. Ceccolini*, U.S. , 98 S.Ct. 1054 (1978), is misplaced. *Ceccolini* is not an eavesdropping case and thus is not controlled by § 2515. Nevertheless, this Court indicated in *Ceccolini* that the *elapse* of time between the unauthorized search and the discovery of a witness, is only one of the factors to be considered in determining whether any taint has been attenuated. The more important criterion is the location of proof which is

*The statutory proscriptions of § 2515 and Rule 4506 of the New York Civil Practice Law and Rules (reproduced in our Appendix) foreclose the use of the fruits of the illegal evidence gained.

unaffected by the evidence contaminated by an illegal seizure.* In this case, the trail between the original illegality and its ultimate exploitation, although lengthy, is uninterrupted and direct.

Our courts have consistently held that only if there is a broken connection between an official violation and the ultimate evidentiary profit can we assume that exclusion will not foster police restraint or that the admission of spoiled evidence will not encourage lawless action. *Brown v. Illinois*, 422 U.S. 590 (1975); *Crews v. United States*, 389 A.2d 277 (D.C. Ct. App. 1978). Indeed, as exemplified by this case, the employment of this misconceived rule of attenuation would, in fact, encourage officials to pursue the unlawful use of electronic evidence before grand juries, confident that after-the-fact recognition of available constitutional alternatives, would shield their wrong.

Perhaps the case which most closely resembles our own is *United States v. Scios*, F.2d (D.C. Cir., July 21, 1978, No. 75-1619), where the District of Columbia Court of Appeals, sitting en banc, held that *testimony* tainted by an illegal seizure was inadmissible against the defendant in a criminal prosecution. The Circuit Court grappled with, and rejected, the excuse of attenuation. Under no circumstances can the evasive answers claimed to have been given by the petitioner constitute an independent factor contributing to any suggested attenuation.

*In *Ceccolini* a police officer, while in the defendant's flower shop, noticed an envelope containing policy slips. An employee of the shop told the police officer, upon inquiry, that it belonged to the defendant. Ultimately a federal grand jury indicted the defendant for perjury based upon the employee's testimony. This Court emphasized, "[t]he evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will, in no way coerced or even induced by official authority as a result of Biro's discovery of the policy slips. Nor were the slips themselves used in questioning Hennessey" (98 S.Ct. at 1062). Clearly, there is no comparison between *Ceccolini* and our case.

It is a strange rule of law that rewards a recalcitrant witness, who defiantly and flatly refuses to answer questions before a grand jury, with a dismissal of the indictment. Whereas the witness, who follows the prescribed procedures; preserves his constitutional claims; and answers the questions under protest, is penalized. This incongruity cannot be condoned under any civilized concept of law.

The resolution of the serious question presented by this petition is bound to carry implications and give directions far beyond the facts of this case. Further controversy is bound to be generated by this vital question unless it is authoritatively resolved. The confusion and despair facing grand jury witnesses throughout New York State, caused by this decision, is intolerable. Consequently, no case deserves to be reviewed by this Court more. Accordingly, the petition for certiorari should be granted.

Conclusion

For all these reasons, the Court should grant this petition for certiorari.

February, 1979

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE STATE OF NEW YORK COURT OF APPEALS

This opinion is uncorrected and subject to revision before publication in the New York Reports.

1 No. 487

The People &c.,

Appellant,

vs.

Edward McGrath,

Respondent.

1 No. 426

In the Matter of

Ugo Mancini,

Respondent,

vs.

Michael J. Codd, Police Commissioner of the City of New York,

Appellant.

(487)Robert M. Morgenthau, DA, NY County (Peter L. Zimroth & Edward Agnew McDonald of counsel) for appellant.

Herald Price Fahringer, Paul J. Cambria & Barbara J. Davies, Buffalo, for respondent.

(426)Allen G. Schwartz, NYC Corporation Counsel (L. Kevin Sheridan of counsel) for appellant.

Robert A. Goldschlag & Jack S. Hoffinger, NY City, for respondent.

JASEN, J.:

Today, this court finds itself engaged in the not altogether foreign task of attempting to demarcate the seemingly inexhaustible reach of the exclusionary rule. More specifically, in the first of two cases, *People* v *McGrath*, the question presented is whether in a criminal contempt proceeding the Fourth Amendment requires suppression of a defendant's testimony before the Grand Jury as the fruit of an illegal wiretap. In the companion case, *Matter of Mancini* v *Codd*, the issue posed is whether, in a civil disciplinary proceeding in which a policeman is charged with perjury, the Fourth Amendment requires the suppression of his testimony before the Grand Jury, as well as the testimony of witnesses at the subsequent disciplinary hearing, as fruit of an illegal wiretap.

I

In determining whether, in a particular case, illegally obtained evidence and the fruits thereof must be suppressed, we are guided by the realization that the exclusionary rule functions as a judicially-created tool for the effectuation of constitutionally-guaranteed rights. (*Stone* v *Powell*, 428 US 465, 482; *United States* v *Calandra*, 414 US 338, 348; *Matter of Finn's Liq. Shop, Inc.* v *State Liq. Auth.*, 24 NY2d 647, 653, cert den 396 US 840.) Formulated as a pragmatic response to law enforcement procedures violative of individual liberties, the exclusionary rule has never enjoyed the stature of an end in itself, but, rather, has served solely as a means to an end: a remedial device operating essentially upon a principle of deterrence. At no time has the exclusionary rule been construed as a personal remedial right of a party aggrieved by conduct violative of a constitutional right. (*United States* v *Calandra*, 414 US, at p 347, *supra.*) Thus, we view the applicability of the

exclusionary rule to the cases at bar as dependent upon a balancing of its probably deterrent effect against its detrimental impact upon the truth-finding process.

While the applicability of the exclusionary rule to administrative as well as criminal proceedings in New York can no longer be disputed (see *Matter of Finn's Liq. Shop, Inc.* v *State Liq. Auth.*, 24 NY2d 647, *supra; Matter of McPherson* v *New York City Housing Auth.*, 47 AD2d 828; see also CPLR 4506), we note that the Supreme Court has acknowledged the inapplicability of the exclusionary rule to preclude the "use of illegally seized evidence in all proceedings or against all persons." (*United States* v *Calandra*, 414 US, at p 348, *supra.*) Employing a balancing approach, the Court has declined to apply the exclusionary rule in those areas where the ultimate effectuation of its remedial objectives is only tenuously demonstrable. For example, although a defendant's incriminating statements elicited by the police in violation of *Miranda* v *Arizona* (384 US 436) cannot be used by the prosecution as evidence-in-chief, they may be used to impeach his credibility if he decides to take the stand and testify. Once a defendant voluntarily takes the stand, he has an obligation to testify truthfully. As Chief Justice Burger cogently stated: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Harris* v *New York*, 401 US 222, 226.) In such a case, any deterrent effect which application of the exclusionary rule may work upon police conduct is furnished by the exclusion of the defendant's incriminating statement from the prosecution's evidence-in-chief. To hypothesize that exclusion of these statements for impeachment purposes provides an additional meaningful deterrent to proscribed police conduct assumes too much. (*Id*, at

p 225; *Oregon* v *Hass*, 420 US 714; *Walder* v *United States*, 347 US 62; *People* v *Rothschild*, 35 NY2d 355; see also, *Stone* v *Powell*, 428 US 465, *supra* [deterrent effect of exclusionary rule too insubstantial to permit consideration of search-and-seizure claim on petition for habeas corpus review of state conviction]; *United States* v *Calandra*, 414 US 338, *supra* [deterrent effect of exclusionary rule too insubstantial to apply to proceedings before the Grand Jury]; *Alderman* v *United States*, 394 US 165 [deterrent effect of exclusionary rule too insubstantial to afford standing to challenge search-and-seizure beyond those whose rights were violated by the search-and-seizure].)

In a similar vein, the Court has recently refused to apply the exclusionary rule to preclude the use of evidence obtained illegally by a state police officer in a federal civil tax proceeding (*United States* v *Janis*, 428 US 433), reasoning that the exclusion of such evidence in both state and federal criminal proceedings furnished a sufficient deterrent effect, rendering insubstantial any additional deterrent effect flowing from exclusion of the evidence in the federal civil proceeding. (*Id*, at p 448.) With this background in mind, we proceed to an analysis of the merits of the instant appeals.

II

In *People* v *McGrath*, the defendant was called to testify before the New York County Grand Jury, which included within the scope of its investigation an alleged conspiracy between individuals by the names of Hugh Mulligan and Thomas Callahan to murder a witness in a federal robbery prosecution against Callahan. After having been granted transactional immunity, the defendant inquired whether any questions to be asked of him would be based upon information obtained through electronic surveillance. When informed by the Assistant District Attorney that some of the questions asked might be based upon such information, the defendant declined to answer any questions until the legality of the electronic surveillance was determined by a judge.

Upon appearing before the presiding justice, the defendant maintained that he was entitled to a full suppression hearing to determine the legality of the surveillance. While the court refused to conduct a full hearing, it did examine the eavesdropping orders, concluding that they were facially valid and directing the defendant to return to the Grand Jury and answer all proper questions.

Although the defendant complied with this order, he answered all questions "under protest". On the basis of his testimony before the Grand Jury, the defendant was indicted and charged with two counts of criminal contempt in the first degree. (Penal Law, § 215.51.) The indictment alleged that the defendant's answers were evasive, equivocal and patently false, such that they amounted to no answers at all.

Prior to trial, the second count of the indictment was dismissed for legal insufficiency in that the defendant's answers supporting that count were not considered sufficiently evasive

and equivocal to constitute criminal contempt. As to the first count, although the court, upon the defendant's motion to suppress, held the eavesdropping orders legally defective[1], it nonetheless refused to suppress the defendant's testimony given in response to questions based upon information derived through the wiretap, viewing the defendant's testimony as an independent act calculated to obstruct the investigation of the murder conspiracy conducted by the Grand Jury, rather than as fruit of the illegal surveillance.

At the conclusion of the defendant's trial, the jury returned a verdict finding him guilty of criminal contempt. The Appellate Division reversed and dismissed the indictment, however, concluding that the defendant's grand jury testimony constituted fruit of the illegal wiretap and, therefore, should have been suppressed. The People now appeal to this court. There should be a reversal.

[1]The People maintain that the defendant, having unsuccessfully challenged the legality of the electronic surveillance before the Grand Jury, may not now again in this criminal contempt proceeding seek to suppress evidence derived through the wiretap. While it would appear that some federal courts have adopted this rule (see, e.g., *United States* v *Morales*, 566 F2d 402, 408), we believe the better rule is to permit a defendant in a criminal contempt proceeding to seek suppression of evidence derived through a wiretap if he has raised this objection before the Grand Jury and, at that time, had sought instruction from the court. (See *People* v *Einhorn*, 35 NY2d 948, 949-950.)

III

In *Matter of Mancini* v *Codd*, the police, during the course of a narcotics investigation, placed a wiretap upon the telephone of Sylvestro Nanfro, respondent Ugo Mancini's cousin, through which they overheard conversations participated in by respondent indicating that the latter was involved in loansharking and bookmaking operations. Based upon the information obtained through the wiretap, the District Attorney subpoenaed respondent and a fellow policeman, Joseph Cembrale, to testify before the Bronx County Grand Jury.

Upon appearing before the Grand Jury, respondent was asked whether he knew Cembrale, to which he responded by inquiring whether he, Mancini, was the target of the police investigation. The District Attorney informed respondent that his role before the Grand Jury was one of a witness, rather than a target of the investigation. After further advising respondent of the availability of the privilege against self-incrimination, respondent invoked that privilege and requested immunity — a request which the Grand Jury granted. Prior to resuming his questioning of respondent, the District Attorney warned respondent that, notwithstanding a grant of transactional immunity, a witness before the Grand Jury remained subject to prosecution for perjury and contempt. At this point, after indicating that he had no further questions, respondent proceeded to testify.

In April of 1971, the Grand Jury returned a nine-count indictment charging respondent and Cembrale with having committed perjury before the Grand Jury. Both officers were immediately suspended from the New York City Police Department. Thereafter, on June 17, 1971, formal departmental charges were filed against respondent, nine

specifications of which mirrored the perjury indictment, the remaining three of which charged respondent with associating with known loan sharks and extortionists.

While Cembrale pleaded guilty to a misdemeanor in satisfaction of the indictment and was placed on probation, respondent pleaded not guilty and moved to suppress the recorded telephone conversations implicating him in loan-shaking and bookmaking operations. On November 19, 1974, the Supreme Court, Bronx County, granted respondent's motion ordering "the suppression of that factual information which came to the knowledge of the People by reason of the eavesdrop * * * *" The basis for the order of suppression was the failure of the wiretap warrant to indicate Sylvestro Nanfro's name as the person whose conversations were to be intercepted and the failure of the District Attorney to make timely application to amend the warrant to include additional crimes overheard. Lacking this critical evidentiary material, the District Attorney subsequently discontinued the case against respondent.

In April of 1975, appellant Police Commissioner commenced the departmental disciplinary proceeding against respondent, at which point respondent moved to suppress his grand jury testimony as the fruit of an illegal wiretap. However, the trial commissioner reserved decision. At the hearing, the evidence introduced by the Department consisted of respondent's grand jury testimony and the testimony of three witnesses, Sylvestro Nanfro, Joseph Cembrale and Benedetto Carbonetto, all of which contradicted respondent's testimony before the Grand Jury.

At the conclusion of the hearing, respondent renewed his motion to suppress his grand jury testimony, requesting additionally the exclusion of the remainder of the Department's evidence, including the testimony of the three witnesses, as fruit of an illegal wiretap. Although the trial commissioner granted respondent's motion as to the three specifications charging respondent with associating with known loan sharks and extortionists, and dismissed those specifications, he ruled admissible, as to the remaining nine perjury specifications, respondent's grand jury testimony and that of the three witnesses.

On the merits, the trial commissioner found respondent guilty of seven of the nine specifications and recommended that respondent be dismissed from the Police Department. Appellant Commissioner adopted the trial commissioner's recommendation and formally dismissed respondent from the Department. Respondent then commenced the instant Article 78 proceeding to annul appellant's determination on the ground that all evidence introduced by the Department at the disciplinary hearing constituted fruit of an illegal wiretap and, therefore, should have been excluded. Upon transfer from Special Term, the Appellate Division reversed, holding the challenged evidence inadmissible, and remanded for a new hearing, at which the introduction of evidence would be limited to that derived independently of the eavesdrop. The Commissioner now appeals to this court. There should be a reversal.

IV

In both cases, McGrath and Mancini, respondents on these appeals, maintain initially that the use of information obtained through the illegal wiretaps to elicit testimony before the Grand Jury was absolutely precluded by CPLR 4506 (subd [1]), which provides:

> "The contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court or grand jury, or before any legislative committee, department, officer, agency, regulatory body, or other authority of the state, or a political subdivision thereof; provided however, that such communication, conversation, discussion or evidence, shall be admissible in any civil or criminal trial, hearing or proceeding against a person who has, or is alleged to have, committed such crime of eavesdropping."

We do not agree. The New York eavesdropping statute was intended to conform "State standards for court authorized eavesdropping warrants with federal standards * * * *" (Governor's Memorandum, L 1969, ch 1147, NY Legis Ann, 1969, p 586; *People* v *Mulligan*, 40 AD2d 165, 166.)

The pertinent federal statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 USC §§ 2510 et seq.), contains the identical exclusionary language (18 USC § 2515). Nonetheless, the federal courts have read section 2515 in conjunction with section 2518 (subdivision [10], paragraph [a]), which defines the class of persons entitled to make a motion to suppress such evidence. Although section 2515, like CPLR 4506

(subd [1]), makes reference to the Grand Jury, section 2518 (subdivision [10], paragraph [a]), like its New York analogue, CPLR 4506 (subdivision [2]), does not include a person called before the Grand Jury within the definition of an aggrieved person entitled to make a motion to suppress evidence obtained through illegal electronic surveillance. In fact, the Senate Report on this legislation states:

> "This provision [§ 2518(10(a)] must be read in connection with section 2515 and 2517, discussed above, *which it limits*. It provides the remedy for the right created by section 2515. Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. [*United States* v *Blue*, 384 U.S. 251 (1966).] There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding." (S. Rep. No. 1097, 90th Cong., 2d Sess., printed in 1968 Code Cong. & Admin. News, pp 2112, 2185.)

Based upon this legislative history, federal courts have held that in a proceeding before the Grand Jury a witness is entitled to a suppression hearing only where there is an absence of a court order permitting the eavesdropping or the Government concedes the illegality of the surveillance or where there has been a prior judicial adjudication of illegality. (*In re Persico*, 491 F2d 1156, 1162, cert den 419 US 924; *United States* v *Morales*, 566 F2d 402, 407, *supra; In re Millow*, 529 F2d 770, 773; *In re Grand Jury Proceedings [United States v Worobyzt]*, 522 F2d 196, 198, cert den 425 US 911; *Droback* v *United States*, 509 F2d 625, cert den 421 US 964.) Thus, inasmuch as New York's

eavesdropping statute was intended to conform state standards with federal standards (see *People* v *Mulligan, supra*), we believe that the information obtained through the wiretaps in *McGrath* and *Mancini*, as well as the fruits of that surveillance — *i.e.*, the testimony of respondents — was admissible before the respective Grand Juries.

Having determined that this evidence was admissible at these proceedings, we believe that its admission in the subsequent criminal contempt proceeding in *McGrath* and the civil disciplinary proceeding in *Mancini*, rests upon the application of attenuation principles. The federal eavesdropping statute (18 USC §§ 2510 et seq.), upon which CPLR 4506 is modeled, was neither intended to expand the existing role of suppression in search-and-seizure law, nor to modify the principle of attenuation. (1968 Code Cong. & Admin. News, pp 2112, 2185; *United States* v *Giordano*, 416 US 505, 528, n17.) Consequently, respondents' argument that CPLR 4506 absolutely precludes the use of this evidence irrespective of attenuation must fail.

The question whether an intervening event may be of sufficient magnitude to break or attenuate the causal relationship between unlawful police conduct and the acquisition of evidentiary proof so as to dissipate the taint (see *Wong Sun* v *United States*, 371 US 471; *Nardone* v *United States*, 308 US 338; *People* v *Mendez*, 28 NY2d 94, cert den 404 US 911) is not resolvable by precise mathematical calculation. (*United States* v *Ceccolini*, ____US____, 98 S Ct 1054, 1059; see, e.g., *Brown* v *Illinois*, 422 US 590; *People* v *Townes*, 41 NY2d 97; *People* v *Munger*, 37 AD2d 950, app dsmd 33 NY2d 576.) The factors to be considered in making such a determination have recently been explored by the Supreme Court in a case not unlike *Mancini*.

In *United States* v *Ceccolini (supra)*, a police officer, on assignment as a school crossing guard, entered the defendant's flower shop on his break to converse with a friend, an employee of the shop. While engaged in conversation, the officer noticed an envelope from which money protruded lying on the cash register drawer. Upon examining the envelope, the officer discovered that it contained policy slips as well as money. Without informing the employee of the contents of the envelope, the police officer inquired as to its owner, to which inquiry the employee responded that it belonged to the defendant, who had instructed her to give it to a third party. Ultimately, the defendant was indicted for perjury before a federal Grand Jury. However, the trial court held the testimony of the employee of the flower shop, who had subsequently been contacted by, and had provided information to, the Federal Bureau of Investigation concerning the incident, inadmissible as fruit of the illegal search of the flower shop conducted by the police officer during his conversation with the employee.

In reversing and holding this testimony admissible, the Supreme Court, although rejecting a per se rule that testimony of a live witness is not subject to the exclusionary rule irrespective of its proximity to unlawful police conduct, concluded that the causal connection between the illegal search and the witness' testimony was sufficiently attenuated to permit introduction of the challenged testimony. (*Id*, at p ____, 98 S Ct, at p 1062.) The factors considered important by the Court in reaching this conclusion were essentially threefold: the degree of free will exercised by the witness in testifying; the "length of the road" between the illegal search and the authority's initial contact with the witness and between that contact and the witness' trial testimony; and, a consideration of the purpose of the exclusionary rule as weighed against the impact upon the

truth-finding process resulting from its application.

In both *McGrath* and *Mancini*, we believe that respondents' actions in testifying as they did before the Grand Jury after having been granted immunity constituted acts sufficiently independent of the illegal wiretap so as to dissipate any taint flowing from the proscribed police conduct. (*United States* v *Raftery*, 534 F2d 854, 857, cert den 429 US 862; *United States* v *Turk*, 526 F2d 654, 667, cert den 429 US 823.) The protections afforded by constitutionally-guaranteed rights may not be cavalierly converted into a license to commit perjury or contempt by evasive answer. (*People* v *Ianniello*, 21 NY2d 418, 423, cert den 393 US 827; cf., *United States* v *Wong*, 431 US 174; *United States* v *Mandujano*, 425 US 564; *United States* v *Knox*, 396 US 77; *United States* v *Bryson*, 396 US 64.) Having been granted immunity, respondents had no cause to testify as they did before the Grand Jury. Although respondents' appearances before the Grand Jury must be viewed as causally related to the illegal wiretaps, their voluntary and deliberate acts in choosing to testify falsely and evasively before that body furnished vitally independent links in the chains of causation.

In so holding, we reject respondent McGrath's contention that the illegality of the wiretap in his case constitutes a defense to a criminal contempt proceeding. True, a witness before the Grand Jury may refuse to answer questions derived from information obtained through an illegal wiretap. Where a witness refuses to answer any questions before the Grand Jury upon this ground, the contempt power may not "be used to compel such testimony or punish the witness for his silence." (*People* v *Einhorn*, 35 NY2d 948, 949, *supra*.) If sustained, the illegality of the wiretap constitutes a defense to prosecution for criminal contempt. *(Id.)* This defense is available to a witness, however only where he remains silent refusing to testify before the Grand

Jury. It is not available to a witness who although choosing to testify does so in an evasive, equivocal and patently false manner. In this regard, contempt by evasive answer, as distinguished from a flat refusal to answer, is conceptually indistinguishable from perjury: no witness has a license to testify evasively or falsely before the Grand Jury. (*People* v *Ianniello*, 21 NY2d 418, 423, *supra*.) In such a case, a witness may not seek to avoid prosecution for criminal contempt by raising the defense of an illegal wiretap. By his own voluntary and independent action before the Grand Jury, an evasively contumacious witness dissipates any taint flowing from police conduct.

There remains, however, a vital distinction between contempt by evasive answer and perjury for the purposes of attenuation. While both evasively contumacious and perjured testimony before the Grand Jury dissipate any taint flowing from an illegal wiretap for the purpose of permitting the introduction of such testimony in subsequent criminal or civil proceedings, there remains in the case of perjury the necessity for the introduction of testimony by other witnesses proving the perjured nature of, as in the case of respondent Mancini, a witness' grand jury testimony. With respect to whether there exists sufficient attenuation of the illegal wiretap to permit the introduction in *Mancini* of the live testimony of witnesses Nanfro, Cembrale and Carbonetto at respondent's disciplinary proceeding, we direct our attention once again to the attenuation factors considered by the Supreme Court in *United States* v *Ceccolini* (____US____, 98 S Ct 1054, *supra*).

In regard to the degree of free will exercised by the live witnesses in testifying, we recognize that the analogy in *Mancini* to *Ceccolini* is less than compelling. In *Ceccolini*, the Court commented that the employee's testimony was neither coerced

nor induced by official authority, demonstrating a greater likelihood that he or she might have been discovered by legal means. (*Id*, at p ____, 98 S Ct, at p 1060; see also *People* v *Mendez*, 28 NY2d 94, 101, *supra*.) In contrast, the degree of free will exercised, at least by witnesses Nanfro and Cembrale, who were indicted for loansharking and perjury, respectively, and who both pleaded guilty to those charges, is far less evident. In fact, Nanfro was on parole at the time he testified and Cembrale, who was placed on probation, was reinstated to the Police Department on condition that he testify against respondent. Certainly, at least with respect to these witnesses, a claim that they testified as a result of inducement by the authorities cannot be disregarded. In fact, in assessing the likelihood of their discovery by the authorities through legal means apart from the illegal wiretap, one must characterize that contingency as remote.

Turning to the second factor, the "length of the road" between the illegal wiretap and the authority's initial contact with the witness and between that contact and the witness' live testimony, we find that the scale tips in favor of admissibility. As in *Ceccolini*, substantial time periods elapsed between these critical dates: the illegal wiretap was placed upon Nanfro's telephone in August of 1970; respondent was not indicted for perjury until April of 1971 (the earliest date upon which the authorities could have contacted these witnesses to testify as to respondent's perjury); and, finally, the witnesses did not testify against respondent at the disciplinary hearing until April of 1975. Under these facts, the road emanating from the wiretap, although perhaps not winding, was certainly a lengthy one.

The last, and in our view perhaps most important factor to be addressed, is whether, accepting the obvious detrimental impact upon the truth-finding process which the exclusionary rule often

produces, its accompanying deterrent effect is sufficiently probable to justify its application. In this regard, we have noted earlier the increasing emphasis on the deterrent effect of the exclusionary rule as the single-most, if not sole, justification for its application. (See *Stone* v *Powell*, 428 US 465, *supra; United States* v *Janis*, 428 US 433; *supra; United States* v *Calandra*, 414 US 338, *supra; United States* v *Harris*, 401 US 222, *supra*.) Concededly, this case does not fall within the holding of *United States* v *Janis (Supra)*, in that, although, like *Janis*, a civil proceeding is involved, the unlawful police conduct challenged in this case was committed not by officers of a different sovereign, but by officers of the same sovereign in which the civil proceeding was commenced. Nonetheless, we view the Supreme Court's rationale in *Janis* permitting the introduction of the challenged evidence equally applicable to the instant case.

Our analysis centers upon a presumed spectrum of deterrence emanating from judicial application of the exclusionary rule. Naturally, the deterrent impact of the exclusionary rule is presumably most effective where evidence obtained by unlawful police conduct is suppressed in a criminal prosecution of a charge substantively related to the acquired evidence. Beyond this, any further increment of deterrent effect must, of logical necessity, decrease. The probable deterrent effect resulting from suppression of illegally obtained evidence in a collateral criminal proceeding such as a prosecution for perjury or contempt by evasive answer, is all the more insubstantial when the evidence is suppressed in a civil proceeding, the gravamen of which is, as in the case of perjury, collateral to the original purpose for obtaining the challenged evidence.

We emphasive that *Mancini* is not a case such as *Matter of Finn's Liq. Shop, Inc.* v *State Liq, Auth.* (24 NY2d 647, *supra*), in which the evidence suppressed at the administrative

proceeding to suspend Finn's liquor license consisted of proof of the underlying violation with which Finn was charged. Nor, as in *Finn*, was the evidence in this case seized by the agents of, or for the purposes of, the agency conducting the administrative proceeding. On the contrary, the wiretap was placed by the police in good faith upon the telephone of respondent's cousin, Nanfro, whom they suspected of participation in a narcotics operation. In our view, the deterrent purpose of the exclusionary rule would be little advanced by the insubstantial, if existent at all, probability that the police — if not already deterred by suppression of their acquired evidence in a criminal prosecution charging the crime underlying their investigative efforts — would be deterred from engaging in proscribed conduct by suppression of that evidence in an unrelated civil proceeding.

Thus, we conclude that, on balance, the "length of the road" between the illegal wiretap and the testimony of witnesses Nanfro, Cembrale and Carbonetto, but especially because of respondent's intervening willful act of perjury, together with the insubstantial benefit to be gained at the expense of the truth-finding process by application of the exclusionary rule militates against suppression of their live testimony.

Having concluded that the testimony of respondents McGrath and Mancini, as well as the live testimony of witnesses Nanfro, Cembrale and Carbonetto, was admissible in the respective proceedings, we address a final contention raised by respondent McGrath: that is, whether the trial court erred in permitting the prosecution, over counsel's objection, to read to the jury the entire 197 pages of respondent's grand jury testimony, replete with references to underworld crime figures, when the testimony relevant to the contempt charge covered only 10 pages. We agree with respondent that the introduction

of his entire grand jury testimony was error. While a trial court may in its discretion permit the introduction of background information to enable a jury to comprehend the subject matter of a defendant's perjury (*People* v *Doody*, 172 NY 165), it must strike a proper balance between the benefit gained by the introduction of such evidence as against the highly prejudicial impact which its introduction may work upon the jury. (See *People* v *Standard*, 32 NY2d 143). In the instant case, the benefit alleged by the prosecution as justification for the introduction of respondent's entire grand jury testimony — a demonstration of respondent's otherwise precise memory — was clearly outweighed by the highly prejudicial impact of this testimony. For this reason, although we have considered and rejected the remainder of respondent McGrath's contentions, including the contention that his answers were not contumacious, as a matter of law, we believe a new trial is mandated.

Accordingly, the order of the Appellate Division in *People* v *McGrath* should be reversed and the case remitted for a new trial. In *Matter of Mancini* v *Codd*, the order of the Appellate Division should be reversed and the determination of the Police Commissioner of New York City reinstated.

* * *

In No. 487 — People v. McGrath:

Order reversed and the case remitted to Supreme Court, New York County, for a new trial. Opinion by Jasen, J. All concur.

In No. 426 — Matter of Mancini v. Codd:

Order reversed, with costs, and the determination of the Commissioner reinstated. Opinion by Jasen, J. All concur.

Decided November 30, 1978

APPENDIX B

OPINION OF THE APPELLATE DIVISION OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

57 A.D.2d 405

**The PEOPLE of the State of New York,
Plaintiff-Respondent,**

v.

Edward McGRATH, Defendant-Appellant.

Supreme Court, Appellate Division,
First Department.

May 31, 1977.

Defendant was convicted in the Supreme Court, New York County, Rothwax, J., of criminal contempt in first degree and he appealed. The Supreme Court, Appellate Division, Lupiano, J., held that: (1) defendant's grand jury testimony, which formed basis of contempt conviction should have been suppressed, where it was derived from unlawful electronic surveillance, and (2) defendant did not waive Fourth Amendment right by refusing to answer upon court direction to do so.

Judgment of conviction reversed, motion to suppress granted and indictment dismissed.

1. Grand Jury — 36

Grand jury witness need not answer questions based on information obtained as result of illegal wiretapping nor may contempt power be used to compel such testimony or punish witness for his silence. 18 U.S.C.A. § 2515.

2. Grand Jury — 36

In New York State grand jury proceeding, witness claiming questions are based on information obtained as result of illegal wiretapping must request to be brought before court and that request obligates prosecutor to affirm or deny the underlying facts. 18 U.S.C.A. § 2515.

3. Grand Jury — 36

Evasive grand jury testimony forming basis of contempt conviction should have been suppressed, where it was derived from unlawful electronic surveillance and fact that witness decided to answer questions was not independent intervening factor sufficient to dissipate taint arising from illegal eavesdropping and did not preclude witness from raising unlawful eavesdropping as defense to contempt indictment. U.S.C.A. Const. Amend. 4; 18 U.S.C.A. § 2515.

4. Grand Jury — 36

It was unnecessary and prejudicial to admit defendant's entire grand jury testimony at contempt trial based upon evasive answers he gave before grand jury, where such testimony included irrelevant matter as, for example, defendant's contact with known racketeers and some effort should have been made at redaction.

5. Grand Jury — 36

Upon defendant's raising his Fourth Amendment right at grand jury proceeding, it was correct procedure to take him before court which then inspected the surveillance orders in camera and directed defendant to answer and defendant was not entitled to full suppression hearing in course of grand jury

inquiry. U.S.C.A. Const. Amend. 4.

6. Searches and Seizures — 7(27)

When defendant, upon raising Fourth Amendment right at grand jury proceeding, was taken before court which inspected electronic surveillance orders in camera and directed defendant to answer, defendant did not waive Fourth Amendment right by not refusing to answer. U.S.C.A. Const. Amend. 4.

7. Constitutional Law — 43(1)

Ignorance or absence of knowledge is critical where waiver of constitutional right is concerned.

Herald Price Fahringer, Buffalo (Barbara J. Davies, Buffalo, with him on the brief), for defendant-appellant.

Edward Agnew McDonald, New York City, of counsel, Peter L. Zimroth, New York City, with him on the brief; Robert M. Morgenthau, Dist. Atty., for plaintiff-respondent.

Before MURPHY, P.J., and LUPIANO, EVANS, CAPOZZOLI and MARKEWICH, JJ.

LUPIANO, Justice:

On February 20, 1973, defendant appeared as a witness before a Grand Jury and was granted transactional immunity. Defendant inquired if any of the questions to be asked were based on evidence acquired through any form of electronic surveillance, to which the assistant district attorney responded: "(I)t is anticipated that some of the questions which will be asked of you . . . may be derived from electronic eavesdropping

. . . ." Defendant's request to be taken before the court was honored and at such time defendant sought to determine whether the questions to be asked were derived from unlawful electronic surveillance. Defense counsel argued that defendant was entitled to a full suppression hearing. In denying such hearing, the justice presiding examined the eavesdropping applications and found each on its face to be valid. He directed defendant to return to the Grand Jury and answer "all legal and proper questions." Upon his return, defendant advised that he would answer "under protest." He then proceeded to answer questions propounded in a lengthy interrogation the transcript of which is over one hundred and eighty pages. On the basis of this testimony, defendant was indicted for two counts of Criminal Contempt In The First Degree, in violation of Penal Law § 215.51 in that his answers were so equivocal, evasive and patently false as to amount to no answer at all. Before trial the second count was dismissed because defendant's answers to the line of inquiry which was the basis of said count were deemed sufficiently unequivocal to preclude a charge of evasive contempt.

Prior to trial on the one remaining count, defendant moved to suppress his Grand Jury testimony. He argued in support thereof that the questions underlying the alleged contempt were based upon unlawful electronic surveillance orders. These orders from which the questions propounded to defendant before the Grand Jury were derived, were found to be legally defective by the court. Nevertheless, the court denied defendant's motion, concluding that the evidentiary ban against the fruits of illegal electronic surveillance did not apply to this case. This conclusion was premised on the observation that defendant's false and evasive testimony was the product of his independent decision to improperly obstruct the Grand Jury's

investigation and was not the product of evidence derived from illegal electronic surveillance.

At trial defendant was convicted of the one count of evasive contempt. On appeal he argues, *inter alia*, that it was error not to suppress his Grand Jury testimony derived from unlawful electronic surveillance and that reversible error was committed by the trial court in permitting the reading to the petit jury of the *entire* transcript of defendant's Grand Jury testimony, containing "a host of highly prejudicial areas of inquiry irrelevant to the specific question under indictment."

The critical issue is whether a Grand Jury witness who has been indicted for criminal contempt based upon alleged equivocal, evasive and patently false answers ("evasive" contempt) may have such testimony suppressed and the indictment dismissed on the ground that the questioning was the product of improper electronic surveillance.

"Initially, we note that the New York eavesdropping statutes were intended, when enacted, to harmonize State law on electronic surveillance with Federal law. (See Governor's Memorandum on an approval of L.1969, ch. 1147, N.Y. Legis. Annual, 1969, p. 586.)" (*People v. Mulligan*, 40 A.D.2d 165, 166, 338 N.Y.S.2d 488, 490 [1st Dept., 1972]). Examination of Federal cases which have concerned themselves with this topic is illuminating. The Court of Appeals for the Third Circuit, *in banc*, in *In re Grand Jury Proceedings, Harrisburg, Pennsylvania (Egan)*, 450 F.2d 199 (1971) concerned itself with the issue of whether a citizen summoned before a Grand Jury may object to questions based on information obtained through allegedly illegal wiretapping. One Sister Egan, named in an indictment as an alleged co-conspirator, but not as a co-defendant, was summoned before a Federal Grand Jury investigating

an alleged plot to kidnap a high public official. She was granted "transactional" immunity, but refused to testify before the Grand Jury, contending that the information which prompted the questions propounded to her flowed from illegal electronic surveillance. After being instructed by the court to answer the questions and refusing to answer, she was held in contempt. It was noted that the Fourth Amendment's basic purpose is to safeguard the security and privacy of citizens against arbitrary invasions by governmental officials. Section 2515 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2515) was viewed as "an unequivocal bar to questioning one before a grand jury if the questions are derived from electronic surveillance conducted in the absence of a properly issued warrant and aimed at the witness, if the witness himself objects to the interrogation" (450 F.2d at 202). Said section provides:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, *grand jury*, department, officer, agency, regulatory body, legislative committee, or other authority *of the* United States, a *State, or a political subdivision thereof*, if the disclosure of that information would be in violation of this chapter" (Emphasis supplied).

The Third Circuit Court of Appeals further pertinently observed:

> ". . . a district court may not compel the violation of an express congressional prohibition. Section 2515 of the Act directly and clearly forbids the presentation to a grand jury of evidence derived from the contents of oral communications improperly obtained. The Government does not except to such position. . . In order to effectuate the legislative purpose, Congress prohibited not only the introduction of the contents of conversations illegally obtained, but also any evidence derived therefrom. Such a rule has a two-fold effect — to protect the courts from becoming unwilling participants in illegal governmental activity, and to protect the privacy of citizens. In framing the legislation in question, Congress adopted a traditional judicial approach to Fourth Amendment problems — a prohibition against the use of evidence seized in violation of the Amendment, and also a prohibition against the use of evidence acquired by the Government as a result of the inhibited conduct. In the present case the District Court had a duty to follow the express direction of Congress found in § 2515. *By ordering Sister Egan to testify before the grand jury when Congress has legislated the exclusion of such evidence, the District Court simply acted inconsistently with the legislative mandate*" (450 F.2d at 209) (Emphasis supplied.)

The conferring of transactional immunity did not deprive Sister Egan of standing to raise the § 2515 defense to a proposed judgment of contempt because she continued "to have a substantial interest in preventing the Government from compounding its original violation of her privacy by forcing her to answer questions that would concededly not be asked absent the information discovered through the use of unwarranted wiretaps" (450 F.2d at 210). Otherwise, the right of citizens to be free from questions based on illegal electronic surveillance would be placed beyond judicial review by the mere expedient of affording such immunity. The Fourth Amendment cannot be thus circumvented. Accordingly, it was concluded that the District Court's judgment of contempt be vacated and the matter remanded for a hearing to determine whether *the grand jury questions* in the case were the fruits of unconstitutional

electronic surveillance.

The Circuit Court's determination was approved in *Gelbard v. United States*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). In *Gelbard*, the question "whether a showing that *interrogation* would be based upon the illegal interception of the witness' communications constitutes a showing of 'just cause' that precludes a finding of contempt" (408 U.S. at 45, 92 S.Ct. at 2360) (Emphasis supplied) was answered in the affirmative. The United States Supreme Court proceeded on the premise that the Government had utilized improper electronic surveillance and the testimony sought from the witnesses was "evidence derived" from the intercepted communications within the meaning of § 2515 and that said section "prohibits the presentation to grand juries of the *compelled* testimony of these witnesses. The narrow question, then, is whether under these circumstances the witnesses may invoke the prohibition of § 2515 as a defense to contempt charges brought on the basis of their refusal to obey court orders to testify. We think they may" (408 U.S. at 47, 92 S.Ct. at 2360) (Emphasis supplied). Mr. Justice Brennan in delivering the opinion of the Court declared:

> "The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. . . Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that § 2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents. . . (t)o compel the testimony of these witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure" (408 U.S. at 51-52, 92 S.Ct. at 2362). "Furthermore, grand jury witnesses do not normally discover whether they may refuse to answer questions by filing motions to suppress their potential testimony. The usual procedure is, upon the Government's motion, to have a court order a grand jury witness to testify upon penalty of contempt for noncompliance" (408 U.S. at 60, 92 S.Ct. at 2367).

[1, 2] It is well settled that "(a) Grand Jury witness need not answer questions based on information obtained as the result of illegal wiretapping (U.S. Code, tit. 18, § 2515). Nor may the contempt power be used to compel such testimony or punish the witness for his silence. The claim of illegal wiretapping, if sustained, constitutes a defense" (*People v. Einhorn*, 35 N.Y.2d 948, 949, 365 N.Y.S.2d 171, 324 N.E.2d 551, 552 [1974]). Parenthetically, it is noted that in contradistinction to *Einhorn*, the defendant here did seek the advice or instruction of the court upon a concession by the People that electronic surveillance was utilized, which concession was mandated by defendant's initial raising of the issue and at the Grand Jury prior to giving his testimony.*

[3] The analysis set forth above would mandate a reasoned conclusion that the Grand Jury testimony of defendant herein

*As noted in the footnote to the Court of Appeals' Per Curiam in *Einhorn*, 35 N.Y.2d at 949, 365 N.Y.S.2d at 171, 324 N.E.2d at 552: "The Federal statute (U.S. Code, tit. 18, § 3504) requiring the prosecutor to affirm or deny in Federal Grand Jury proceedings (where the witness raises a § 2515 claim) does not apply to the States, and the legislative history indicated that the omission was intentional." In New York State Grand Jury proceedings, the witness must request to be brought before the court and this request *obligates* the prosecutor to affirm or deny the underlying facts. Of course, the prosecutor may at his discretion affirm or deny the underlying facts upon the mere raising of the claim.

which forms the basis of his contempt conviction must be suppressed as it proceeded from question arising out of improper electronic surveillance. However, the People claim that once defendant began answering the questions he was obligated to respond forthrightly and truthfully; that his decision to answer the questions was an independent intervening factor sufficient to dissipate the taint arising from the illegal eavesdropping which formed the basis for the questions; and that a witness who answers evasively may not raise the unlawful eavesdropping as a defense to a contempt indictment. These contentions are without merit and to sustain them would result in a perversion of Fourth Amendment rights. The distinction between contempt based on refusal to answer when directed to answer and contempt based on evasive testimony when directed to answer is one without substance under the circumstances herein. Both types of contempt result in noncompliance with the directive to answer. In the first instance, there is no answer because of a refusal to answer. In the second, there is no answer because the answer is "so false and evasive as to be equivalent to no answer at all" (*People ex rel. Valenti v. McCloskey*, 6 N.Y.2d 390, 398, 189 N.Y.S.2d 898, 903, 160 N.E.2d 647, 651 [1959]).

An excellent analysis of contempt is set forth in *People v. Ianniello*, 36 N.Y.2d 137, 365 N.Y.S.2d 821, 325 N.E.2d 146 (1975). In that case, Chief Judge Breitel observed:

> "To be guilty of contempt the witness need not flatly refuse to answer the questions put to him; false and evasive profession of an inability to recall, which amounts to no answer at all, is punishable as criminal contempt (citations). . . . Certain offenses, grouped under the general statutory headings of 'perjury' and 'other offenses relating to judicial and other proceedings', contain an element involving materiality, legality or propriety (Penal Law, §§ 210.10 [perjury in the second degree]; 210.15 [perjury in the first degree]; 210.40 [making an apparently sworn false statement in the first degree]; 215.50 [criminal contempt in the second degree]; 215.51 [criminal contempt in the first degree]; 215.60 [criminal contempt of the Legislature]; see *People v. Teal*, 196 N.Y. 372, 376, 89 N.E. 1086; *People ex rel. Hegeman v. Corrigan*, 195 N.Y. 1, 9, 87 N.E. 792; *People v. Sharp*, 107 N.Y. 427, 456, 14 N.E. 319; *Wood v. People*, 59 N.Y. 117, 121-122; *Tuttle v. People*, 36 N.Y. 431, 435; see, generally, Denzer and McQuillan, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 39, Penal Law, § 210.15, pp. 696-699; 1939 Report of N.Y. Law Rev. Comm., p. 301, N.Y. Legis. Doc., 1939, No. 65[G]; 1935 Report of N.Y. Law Rev. Comm., p. 227, N.Y. Legis. Doc., 1935, No. 60[F]). In each of these instances, the statute requires either that false statements made by a witness be 'material to the action, proceeding or matter involved', or *that questions put to a witness be 'legal and proper' or 'material and proper'.*" (*People v. Ianniello*, 36 N.Y.2d at 142-143, 365 N.Y.S.2d at 824-825, 325 N.E.2d at 148) (Emphasis supplied).

In analyzing the terms used in the contempt statute and concluding that the legality and propriety of questions asked of a witness is a question of law, it was specifically noted that the term "'Legal' could also refer to questions concededly not based upon tainting illegal sources (see, *e.g.*, U.S. Code, tit. 18, § 2515; *People v. Einhorn*, 35 N.Y.2d 948, 365 N.Y.S.2d 171, 324, N.E.2d 551)" (*People v. Ianniello*, 36 N.Y.2d at 145, 365 N.Y.S.2d at 827, 325 N.E.2d at 150). Study of *People v. Ianniello, supra*, reinforces the conclusion that no vital distinction is served in contrasting contempt accomplished by evasive profession of an inability to recall with that accomplished by a flat refusal to answer where the questions are based upon improper electronic surveillance. Such questions are

not "legal and proper." To hold that the witness' decision to respond to the tainted questions not by silence but by evasion is an independent, intervening factor sufficient to dissipate the taint is to overlook the fact that the indictment is based on *both* the questions and answers, and not the answers alone.

Clearly, defendant seasonably raised his Fourth Amendment claim which obligated the People to admit of the use of electronic surveillance and upon such admission, resulted in the *in camera* inspection by the court of the eavesdropping orders. As a consequence the court perceiving the orders as proper on their face directed defendant to answer. To reiterate, Trial Term on defendant's subsequent motion to suppress concluded the electronic surveillance was improper and defendant had standing to attack the eavesdropping, and that if he had refused to answer, he would have preserved the right to suppress his testimony prior to trial. However, because he had testified, albeit evasively, he was held to have waived this right which is founded on the Fourth Amendment. The result is anomalous. In effect, it is suggested that defendant would have been well advised to refuse to answer all questions, even though in direct violation of the court order directing him to answer. Had he done so, defendant would have immediately and automatically subjected himself to a contempt indictment. *People v. Einhorn, supra* does not countenance utilization of the contempt power to compel testimony or punish a witness for not supplying an answer to questions based on information obtained as the consequence of illegal wire-tapping. Patently, if defendant had the standing to move to suppress his testimony prior to trial on the basis of unlawful eavesdropping, that right must include suppression if the eavesdropping is determined to be improper. To hold otherwise, renders the right to a pre-trial suppression hearing meaningless in an evasive contempt indictment.

"Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices" (*Berger v. New York*, 388 U.S. 41, 63, 87 S.Ct. 1873, 1885, 18 L.Ed.2d 1040 [1967]). In *United States v. Marion*, 535 F.2d 697 (1976), the United States Court of Appeals for the Second Circuit was concerned with a defendant indicted and convicted for perjury on the basis of inconsistent statements and for obstruction of justice on the basis of false and evasive testimony given before a Federal Grand Jury. Said defendant moved to have the indictment dismissed because the evidence presented to the jury derived from improper electronic surveillance. It was held that where the fruits of the tap were improperly utilized as the basis for questions propounded to defendant before the Grand Jury, the counts of the indictment relating to those questions and answers, to wit, the perjury count and the first count of obstruction of justice must be dismissed and defendant's conviction of those counts reversed. The holding of this case as it relates to perjury — a qualitatively more heinous offense than contempt in that it proceeds from the deliberate giving of false testimony as compared and contrasted with the refusal to give an answer whether by silence or by evasive testimony — lends inferential support to the conclusion that the defendant herein was entitled to have his motion to suppress granted.

[4] Two further specific observations are made. First, under traditional notions of attenuation, it cannot be said that the evidence adduced at the trial was not the result of exploitation of the primary illegality (see *Wong Sun v. United States*, 371 U.S. 471, 485-488, 83 S.Ct. 407, 9 L.Ed.2d 441 [1963]). Further, even apart from the Fourth Amendment consideration delineated above, it was unnecessary and prejudicial to admit defendant's *entire* Grand Jury testimony at trial, for such testimony included irrelevant matters as, for example, defend-

ant's contact with known racketeers. Some effort should have been made at redaction (see *People v. Stanard*, 32 N.Y.2d 143, 344 N.Y.S.2d 331, 297 N.E.2d 77 [1973]). This error of itself would at the very least mandate a new trial.

[5-7] Parenthetically, we note that upon defendant's raising of his Fourth Amendment right at the Grand Jury proceeding, the *procedure* whereby defendant was taken before the court which then inspected the surveillance orders *in camera* and directed defendant to answer, was correct. Defendant was not entitled to a full suppression hearing in the course of the Grand Jury inquiry (*Matter of Persico*, 491 F.2d 1156 [2 Cir., 1974]). This fact bears upon Trial Term's view that defendant should be deemed to have waived his Fourth Amendment right by not refusing to answer upon court direction to answer. Ignorance or an absence of knowledge is critical where waiver is concerned. The Fourth Amendment may not be crippled by the simple expedient of a claimed waiver under such circumstances.

The extended analysis herein is limned against fundamental political and philosophical concepts underlying our laws and legal system. "(W)e must be ever mindful of the admonition that in a government of laws, the very existence of the Government will be imperiled if it fails to observe the law scrupulously. For the Government teaches the whole people by its example, and if the Government becomes a law breaker, it breeds contempt for law. To declare that the Government may commit crimes in order to secure the conviction of a criminal may well bring unfortunate retribution" (In re Grand Jury Proceedings, Harrisburg, Pennsylvania [Egan], 450 F.2d at 217). As *Gelbard* warns: "(W)hen a court assists the Government in extracting fruits from the victims of its lawless searches it degrades the integrity of the judicial system. For '(n)othing can destroy a government more quickly than its failure to observe its own

laws, or worse, its disregard of the charter of its own existence.' *Mapp v. Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 1092, 84 A.L.R.2d 933" (*Gelbard v. United States*, 408 U.S. at 67, 92 S.Ct. at 2371).

The judgment of the Supreme Court, New York County (Rothwax, J.) rendered September 20, 1976, convicting defendant, after jury trial, of criminal contempt in the first degree (Penal Law § 215.51), after a hearing denying a motion to suppress defendant's Grand Jury testimony, should be reversed, on the law; the motion to suppress should be granted, and the indictment dismissed.

Judgment, Supreme Court, New York County, rendered on September 20, 1976, unanimously reversed, on the law, the motion to suppress granted and the indictment dismissed.

All concur.

APPENDIX C

OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK (ROBERTS, J.)

86 Misc.2d 249

The PEOPLE of the State of New York v. Edward McGRATH, Defendant.

Supreme Court, Trial Term, New York County, Part 34.
Feb. 26, 1976.

Defendant, charged with criminal contempt in giving false grand jury testimony, moved to suppress such grand jury testimony and dismiss the indictment on the grounds that the questioning was the product of improperly issued electronic surveillance orders. The Supreme Court, Trial Term, New York County, Burton B. Roberts, J., held, inter alia, that an order for electronic surveillance of defendant had been issued without probable cause; that defendant had standing to object to such illegal surveillance; but that, by electing to testify after his objections to such surveillance were overruled, the defendants committed contempt.

Motion denied.

1. Criminal Law — 394.5(2)

Where defendant in prosecution for contempt of grand jury was subjected to electronic surveillance under first of series of some 13 orders, and each such subsequent order was based on information derived from its predecessors, defendant had standing to object to evidence derived from entire series of orders. Penal Law § 215.51; 18 U.S.C.A. § 2515.

2. Telecommunications — 496

Where courts issued some 13 orders for electronic surveillance of defendant, each subsequent order being based upon information derived from its predecessors, illegality of first order would be dispositive of entire issue of legality. 18 U.S.C.A. § 2515.

3. Searches and Seizures — 7(1)

Fourth Amendment, as it applies to eavesdropping, requires probable cause to believe that specific crime has been or is being committed and that particularly described conversations constituting evidence of that crime will be obtained through electronic surveillance at specific locations. CPL 700.15; U.S.C.A. Const. Amend. 4; 18 U.S.C.A. § 2515.

4. Telecommunications — 496

Probable cause for issuance of order for electronic surveillance was not shown by application which merely recounted police observations of repeated meetings between individuals who had extensive criminal records for gambling and other crimes and several meetings between one such individual and various police officers; mere suspicion that something nefarious was afoot was not probable cause. CPL 700.15; U.S.C.A.Const. Amend. 4.

5. Grand Jury — 36

Grand jury witness who claims to be subject of illegal eavesdropping has right to inquiry by sitting Justice into existence of any eavesdropping that may be source of questioning and authorization, if any, for it. 18 U.S.C.A. § 2515; U.S.C.A.Const. Amend. 4.

6. Grand Jury — 36

If People affirm that electronic eavesdropping has taken place without court order or with court order that has been previously adjudicated to be invalid or is conceded to be invalid by People, grand jury witness is entitled to immediate suppression of questions derived from such eavesdropping. 18 U.S.C.A. § 2515; U.S.C.A. Const. Amend. 4.

7. Criminal Law — 394.5(2)

If indicted, grand jury witness who refuses to testify on Fourth Amendment grounds that grand jury questioning was product of illegal electronic surveillance preserves right to suppress his testimony prior to trial; if witness elects to testify before grand jury, however, thereby gaining transactional immunity, he may not subsequently assert nullity of questioning on some ground not previously raised. 18 U.S.C.A. § 2515; U.S.C.A. Const. Amend. 4.

8. Criminal Law — 394.5(2)
Indictment and Information — 144.1(2)

Indictment for criminal contempt of grand jury would be not dismissed, and the defendant's motion to suppress grand jury testimony would be denied, where, although such testimony was in response to questions based on illegal electronic surveillance, defendant never refused to testify before grand jury on Fourth Amendment or any other grounds, automatically received transactional immunity by answering questions posed, and merely testified "under protest" of fact that he was not afforded immediate suppression hearing, remedy he was not entitled to receive. Penal Law §§ 215.51, 250.00, subd. 3, 250.05; CPL 50.10, 190.40, 700.15; 18 U.S.C.A. §§ 2511(1), 2515, 2520;

U.S.C.A. Const. Amends. 4, 5; CPLR 4506, 4506, subd. 1.

9. Grand Jury — 36

Where witness before grand jury felt that questioning was based on information obtained through illegal wiretapping, his proper course of action in order to preserve such objection was categorical refusal to answer grand jury questions. 18 U.S.C.A. § 2515; U.S.C.A.Const. Amend. 4.

10. Grand Jury — 36

Unlike categorical refusal to testify on legal grounds, contumacious evasion manifests distinctive intent to both mislead and obstruct grand jury in performance of its function; such conduct is wholly independent of source of any questioning and is, therefore, not tainted by it. Penal Law § 215.51.

11. Grand Jury — 36

As with crime of perjury, with which it shares element of falsity, contumacious invasion cannot be excused by events which lead to witness' appearance before grand jury. Penal Law § 215.51.

12. Grand Jury — 36

Where grand jury witness, instead of refusing to answer questions posed on ground that they were based on information obtained through illegal wiretap, answered such questions "under protest" but evasively and falsely, such testimony, being result of witness' own independent conduct, could not be said to be "evidence derived" from illegal eavesdropping, and defense to contempt action was therefore not provided by federal and

state statutes prohibiting introduction of "evidence derived" from illegal electronic interceptions. 18 U.S.C.A. §§ 2515, 2520; CPLR 4506, 4506, subd. 1; Penal Law, §§ 215.51, 250.00, subd. 3, 250.05.

See publication Words and Phrases for other judicial constructions and definitions.

13. Grand Jury — 36

Grand jury questions based upon illegal eavesdropping were "legal" within statutory requirement that contumacious refusal to enter grand jury questions be to "legal and proper interrogatory." Penal Law, § 215.51.

See publication Words and Phrases for other judicial constructions and definitions.

Robert M. Morgenthau, Dist. Atty. (Austin Campriello, New York City, of counsel), for People.

Lipsitz, Green Fahringer, Roll, Schuller & James, Buffalo (Herald P. Fahringer, Buffalo, of counsel), for defendant.

BURTON B. ROBERTS, Justice:

This motion raises the novel question of whether a Grand Jury witness who has been indicted for criminal contempt (Penal Law, § 215.51) based upon the allegation of "conspicuously unbelievable, evasive, equivocal and patently false answers" (see *People ex rel. Valenti v. McCloskey*, 6 N.Y.2d 390, 398, 189 N.Y.S.2d 898, 903, 160 N.E.2d 647, 650, app. dism. 361 U.S. 534, 80 S.Ct. 585, 4 L.Ed. 537; *Matter of Finkel v. McCook*, 247 App.Div. 57, 62, 286 N.Y.S.2d 755, affd. 271 N.Y. 636, 3 N.E.2d 460) may have his Grand Jury testimony

suppressed and the indictment dismissed on the ground that the questioning was the product of improperly issued electronic surveillance orders.

The facts may be briefly summarized. On February 20, 1973 the defendant, Edward McGrath, appeared before a Grand Jury of New York County pursuant to subpoena and was sworn. He was immediately advised by an assistant district attorney that his presence was exclusively that of a witness in an investigation, the scope of which was defined for him. He was also informed that he would receive full and complete transactional immunity pursuant to section 50.10 of the Criminal Procedure Law, which was read and explained. Mr. McGrath was then told, in response to an inquiry made by him, that some of the questions about to be propounded were based upon court-ordered electronic surveillance. His ensuing request to be taken before the Court was honored by the assistant district attorney. In court, Mr. McGrath's lawyer argued that his client was entitled to a full suppression hearing. The Justice presiding called for the production of the eavesdropping applications, and reserved decision overnight. The following morning the Justice announced that he had examined the eavesdropping orders and that "each appears on its face to be valid". The Justice then ruled that "[w]hatever rights a witness may have in defense of a contempt proceeding, he cannot move to suppress evidence before a Grand Jury", citing *People v. Costello* (21 N.Y.2d 967, 290 N.Y.S.2d 194, 237 N.E.2d 356). Mr. McGrath was therefore directed to return to the Grand Jury and answer all relevant questions. Reappearing before the Grand Jury, he stated that he had been advised by his attorney that he was not legally obligated to testify without a "judicial hearing" and that he was doing so "under protest". He then proceeded to answer questions for approximately 180 pages of Grand Jury transcript.

A portion of this testimony, pertaining to one facet of the multi-faceted inquiry, constitutes the basis for the single count of contempt now before the Court.[1]

[1-4] In this Court, the People concede that all relevant questioning of the defendant was based upon the eavesdropping alleged to be improperly authorized. A threshold issue, then, is the legality of this eavesdropping, which was undertaken pursuant to a series of some thirteen orders, signed by Justices of the Supreme Court in New York County between May, 1969 and March, 1970. Since each subsequent order was based upon information derived from its predecessors, the defendant, who was overheard in conversation pursuant to the progenitor of the series, the order dated May 7, 1969, has standing to object to evidence derived from the entire series (*Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176; *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441). It follows, then, that the illegality of the first order would be dispositive of the entire issue of legality, and that is, in fact, the case here. The offenses designated as the subject matter of the May 7, 1969 order are bribery, gambling and conspiracy. The application for the order recounts police observations of repeated meetings between men with extensive criminal records for gambling and other crimes, and several meetings between one such individual, Hugh Mulligan, and various police officers. While these meetings are highly suspicious, their subject matter is purely speculative. Mere suspicion that something nefarious is afoot is not probable cause (*People v. Corrado*, 22 N.Y.2d 308, 292 N.Y.S.2d 648, 239 N.E.2d 526). The Fourth

[1]One count of the original two-count indictment was dismissed pursuant to *People v. Renaghan*, 33 N.Y.2d 991, 353 N.Y.S.2d 962, 309 N.E.2d 425, upon inspection of the Grand Jury minutes by another Justice of this Court.

Amendment, as it applies to eavesdropping, requires probable cause to believe that a specific crime has been or is being committed and that particularly described conversations constituting evidence of that crime will be obtained through electronic surveillance at a specific location (*Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040; see CPL § 700.15). The facts set forth in support of the May 7th order, if true, leave little doubt about the good faith of the investigators in attempting to pursue criminal activity, but they do not permit a probable cause conclusion with regard to the nature of any crime being committed or the use of the telephone by participants in criminal activity.[2]

Given the legal insufficiency of the eavesdropping in this case and the defendant's standing to attack it, attention is ready to be turned to the effect on the defendant's Grand Jury testimony and the instant contempt indictment. A summary of the applicable law follows.

The proposition that a claim of illegal eavesdropping may be raised in defense of a Grand Jury witness charged with refusing to answer questions derived from such eavesdropping was first recognized in *Gelbard v. United States*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179. In *Gelbard*, Grand Jury witnesses claiming to be the victims of illegal eavesdropping sought to invoke the prohibition contained in 18 U.S.C., § 2515 in defense to summary civil contempt charges brought for refusal to obey court orders compelling them to testify before the Grand Jury. Section 2515, which was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, provides as follows:

[2]In view of this determination, I find it unnecessary to consider defendant's contention that the warrant itself contained various technical deficiencies in certain provisions pertaining to its execution.

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United Sates, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The narrow question decided by the Court in *Gelbard* was whether section 2515 provided the defense of illegal eavesdropping at the Grand Jury stage to a witness facing a civil contempt charge. In answering this narrow question in the affirmative, the Court assumed for purposes of its decision that the witness' potential testimony would be, under the language of section 2515, "evidence derived" from intercepted communications, and assumed further that such testimony would be "disclosure" in violation of the Omnibus Crime Control Act, citing 18 U.S.C., § 2511(1), which provides criminal sanctions for willful violations. (408 U.S. at p. 47, 92 S.Ct. at 2360, 33 L.Ed.2d at 186.) The Court then based its decision on the premise that unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, and the victim of such interception, disclosure, or use is entitled to recover civil damages (18 U.S.C., § 2520). Reasoned the Court (408 U.S. at p. 52, 92 S.Ct. at 2363, 33 L.Ed.2d at 189):

> Title III makes illegal not only unauthorized interceptions, but also the disclosure and use of information obtained through such interceptions. 18 U.S.C. § 2511(1); see 18 U.S.C. § 2520. Hence, if the prohibition of § 2515 is not available as a defense to the contempt charge, disclosure through compelled testimony makes the witness the victim, once again, of a

> federal crime. Finally recognition of § 2515 as a defense "relieves judges of the anomalous duty of finding a person in civil contempt for failing to cooperate with the prosecutor in a course of conduct which, if pursued unchecked, could subject the prosecutor himself to heavy civil and criminal penalties." *In re Grand Jury Proceedings, Harrisburg, Pennsylvania (Egan)*, 450 F.2d 199, at 220 (Rosenn, J., concurring). "And for a court, on petition of the executive department, to sentence a witness, who is herself the victim of the illegal wiretapping, to jail for refusal to participate in the exploitation of that crime in violation of the explicit command of Section 2515 is to stand our whole system of criminal justice on its head." *In re Evans*, 146 U.S.App.D.C. 310, 323, 452 F.2d 1239, 1252 (1971) (Wright, J., concurring).

The Court specifically did not decide whether the remedy of immediate suppression would be available if the interception had been done pursuant to an improperly issued court order, good faith reliance upon which constitutes under 18 U.S.C. § 2520, a "complete defense to any civil or criminal action". Since the facts pertaining to the possible existence of a court order were not before it, the Court left this question open to the District Court on remand for further proceedings (408 U.S. at p. 61, n.22, 92 S.Ct. at 2367, 33 L.Ed.2d at 194). It is clear, however, that at least five of the Justices would not have required suppression proceedings at the Grand Jury stage where the government produces a court order for the eavesdropping. Wrote Mr. Justice White, who supplied the decisive vote of the 5-4 majority, in a concurring opinion (408 U.S. at p. 70, 92 S.Ct. at 2372, 33 L.Ed.2d at 200):

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine

> the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best. It is well, therefore, that the Court has left this issue open for consideration by the District Court on remand.

Further delineation of the rights of Grand Jury witnesses who had been subject to eavesdropping was forthcoming in later decisions. In *People v. DeSalvo*, 32 N.Y.2d 12, 343 N.Y.S.2d 65, 295 N.E.2d 750, the defendant had refused to answer questions before a Grand Jury on Fifth Amendment grounds after having been given full immunity, and was indicted for criminal contempt. Prior to trial he moved to dismiss the indictment on the ground that his appearance before the Grand Jury was the product of an illegal search of his person and automobile, facts which the People conceded. The motion to dismiss was denied on the ground that the defendant had refused to testify solely because of possible self-incrimination and that the grant of immunity precluded any challenge to the contempt charges based upon an illegal search. The Court of Appeals affirmed the defendant's conviction, rejecting in the process his reliance on *Gelbard v. United States, (supra)*, noting (at p. 15, 343 N.Y.S.2d at 67, 295 N.E.2d at 751): "The [*Gelbard*] court never reached the question whether the Fourth Amendment would shield a Grand Jury witness from a contempt charge for conduct before the Grand Jury * * *", and concluding (at p. 16, 343 N.Y.S.2d at 68, 295 N.E.2d at 752):

"[I]t was the Omnibus Crime Control Act, and not the Fourth Amendment that compelled the result in the *Gelbard* case * * *." The Court then held that in this case the defendant had not preserved the Fourth Amendment issue because he failed to refuse to testify on that ground before the Grand Jury, and had thereby gained the valuable benefit of transactional immunity.

In *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561, the Court confronted questions dealing with the Fourth Amendment rights of Grand Jury witnesses unanswered in *Gelbard* and *DeSalvo*. The Court held that a Grand Jury witness who refused to answer questions on Fourth Amendment grounds had no right to an immediate suppression hearing, ruling that while questions based upon Fourth Amendment violations do constitute a derivative use of illegally obtained evidence, and are therefore subject to the prohibition of the exclusionary rule, the appropriate remedy is suppression prior to trial if and when the witness who has been the victim of an illegal search is subsequently prosecuted. Significantly, the Court expressed the view that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved", and that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." "As with any remedial device", stated the Court, "the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served" (414 U.S. at p. 348, 94 S.Ct. at. 620, 38 L.Ed.2d at 571). The Court then concluded that the increased deterrent effect of extending the exclusionary rule to Grand Jury proceedings would be minimal, while "allowing a grand jury witness to invoke the exclusionary rule would unduly interfere

with the effective and expeditious discharge of the grand jury's duties" (*id.* at p. 350, 94 S.Ct. at 621, 38 L.Ed.2d at 573).

In *Matter of Persico*, 491 F.2d 1156 [2nd Cir. 1974], the Court had occasion to consider the question the Supreme Court remanded for consideration by the District Court in *Gelbard*. In *Persico* a Grand Jury witness was taken before a District Judge on his claim that he was entitled to a plenary hearing on his Fourth Amendment objections to questions posed by the Grand Jury. The Government conceded that the questioning was derived from electronic surveillance but contended that the surveillance was conducted pursuant to court orders. The Judge inspected the orders *in camera*, found them to be proper, and ordered the witness to testify. When the witness, upon his return to the Grand Jury, persisted in his refusal to testify on Fourth Amendment grounds, the Judge summarily held him in civil contempt. Affirming the contempt order the Second Circuit approved the procedure of inspecting the surveillance orders as "all [the witness] was entitled to receive". The Court held that a witness who objects to questions as the product of illegal electronic surveillance may refuse to testify "only if there is an absence of a necessary court order or if there is a concession from the Government that the surveillance was not in conformity with statutory requirements or if there is a *prior* judicial adjudication that the surveillance was unlawful." (491 F.2d at p. 1162 [emphasis in original].) In *People v. Einhorn* (35 N.Y.2d 948, 365 N.Y.S.2d 171, 324 N.E.2d 551, rev'g 45 A.D.2d 75, 356 N.Y.S.2d 620), the Court, in a *per curiam* opinion, adopted the *Persico*-like procedure of an inquiry by the Presiding Justice when section 2515 is invoked at the Grand Jury stage. The Court also stated that the contempt power could not be used to compel testimony or punish a witness for his "silence" to questions based upon eavesdropping which is

"illegal", citing 18 U.S.C., § 2515.

[5-7] From the foregoing review it is possible to distill several principles which bear upon the instant case. A Grand Jury witness who claims to be the subject of illegal eavesdropping has the right to an inquiry by the sitting Justice into the existence of any eavesdropping that may be the source of the questioning and the authorization, if any, for it. If the People affirm that eavesdropping has taken place without a court order or with a court order that has been previously adjudicated to be invalid or is conceded to be invalid by the People, the witness is entitled to immediate suppression of questions derived from such eavesdropping. If the People deny the existence of eavesdropping, the inquiry is generally at an end (but see *People v. Cruz*, 34 N.Y.2d 362, 357 N.Y.S.2d 709, 314 N.E.2d 39, regarding the prosecutor's obligation to make inquiry of other law enforcement agencies.) If the People affirm that there has been eavesdropping and present court orders which are deemed to be valid upon inspection by the Justice, the inquiry is similarly at an end. In these latter instances, the witness must return to the Grand Jury and answer questions or risk possible civil or criminal contempt charges. If indicted, the witness who refuses to testify on Fourth Amendment Grounds preserves the right to suppress his testimony prior to trial. If the witness elects to testify, however, thereby gaining transactional immunity, he may not subsequently assert the nullity of the questioning on some ground not previously raised.

[8] In the instant case, the defendant elected to answer the questions, albeit "under protest" of the fact that he was not afforded an immediate suppression hearing, a remedy he was not entitled to receive. He never refused to testify on Fourth Amendment or any other grounds, and automatically received

transactional immunity by answering. (CPL, § 190.40). Thus, he elected to testify before the Grand Jury and, having done so, he must owe that body the same obligations of forthrightness and candor as any witness, and be subject to the contempt and perjury sanctions if he violates those obligations. To permit any other rule allows a mockery of the proceedings at best, and at worst may seriously undermine the search for the truth. The latter is especially true where, as here, the alleged evasion occurs within the context of other, more forthright testimony.

[9-11] Even if the ground for defendant's protest before the Grand Jury had been a claim of illegal wiretapping, or if his request for a suppression hearing was now to be considered as such a claim, the proper course for him to have taken in order to preserve the objection was a categorical refusal to answer. Unlike a categorical refusal to testify on legal grounds, contumacious evasion manifests a distinctive intent to both mislead and obstruct the Grand Jury in the performance of its function (*Ex Parte Hudgings*, 249 U.S. 378, 383, 39 S.Ct. 337, 339, 63 L.Ed. 656, 658). Such conduct is wholly independent of the source of any questioning and is, therefore, not tainted by it (*People v. Mendez*, 28, N.Y.2d 94, 98, 320 N.Y.S.2d 39, 42, 268 N.E.2d 778, 780; *People v. Munger*, 24 N.Y.2d 445, 453, 301 N.Y.S.2d 39, 44, 248 N.E.2d 882, 886, judgment mod. after hrg., 37 A.D.2d 950, 326 N.Y.S.2d 212, app. dism. 33 N.Y.2d 576, 347 N.Y.S.2d 449, 301 N.E.2d 432; cf. *People v. Martinez*, 37 N.Y.2d 662, 376 N.Y.S.2d 469, 339 N.E.2d 162). As with the crime of perjury, with which it shares the element of falsity (*Ex Parte Hudgings, supra; People ex rel. Valenti v. McCloskey, supra*, 6 N.Y.2d 390, 398-399, 189 N.Y.S.2d 898, 903-904, 160 N.E.2d 647, 650-651) contumacious evasion cannot be excused by events which lead to the witness' appearance before the Grand Jury (*Matter of Nigrone v. Mur-*

tagh, 46 A.D.2d 343, 362 N.Y.S.2d 513, aff'd 36 N.Y.2d 421, 373 N.Y.S.2d 59, 335 N.E.2d 290; cf. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1; *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503).

[12] Section 2515 (18 U.S.C., § 2515, *supra*) does not provide a defense to this kind of contempt action. As previously seen, section 2515 prohibits the introduction of "evidence derived" from interceptions, the "disclosure" of which would be criminally or civilly actionable. The defendant's allegedly evasive testimony before the Grand Jury, being the result of his own independent conduct, may not be said to be "evidence derived" from eavesdropping. Also, the existence of Court orders, which insulate him from liability (18 U.S.C., § 2520, *supra*), precludes his testimony from constituting actionable "disclosure".[3]

[13] A last point is defendant's contention that a conviction cannot be had herein under the definition of the crime itself because questions derived from eavesdropping which is legally insufficient are not "legal" within the requirement that the contumacious refusal be to a "legal and proper interrogatory" (Penal Law, § 215.51). This contention, it is claimed, finds support in *dictum* contained in the following passage from *People v. Ianniello*, 36 N.Y.2d 137, 365 N.Y.S.2d 821, 325 N.E.2d 146, in which the Court, in the process of holding that

[3]CPLR, § 4506, cited by the defendant, is similarly unavailing. Subdivision 1 of § 4506 prohibits the introduction before "any court or grand jury * * *" of any "evidence derived" from conduct constituting the crime of eavesdropping under Penal Law, § 250.05. For reasons already stated, the defendant's alleged evasive testimony is not "evidence derived" from eavesdropping. Moreover, section 250.05 of the Penal Law only makes it a crime to engage in electronic eavesdropping activity which is without court authorization (see Penal Law, § 250.00, subd. 3).

the element of "legality" presented a question of law for the trial judge, stated (at p. 145, 365 N.Y.S.2d at 826, 325 N.E.2d at 149):

> In *People v. Ianniello*, 21 N.Y.2d 418, 288 N.Y.S.2d 462, 235 N.E.2d 439, cert. den. 393 U.S. 827, 89 S.Ct. 90, 21 L.Ed.2d 98, *supra*, "proper" questions were described as those pertinent and relevant to the scope of the Grand Jury's investigation (p. 426, 288 N.Y.S.2d 462, 235 N.E.2d 439). "Legal" questions are those which are "proper", and which do not contravene any testimonial privilege of the witness or his privilege against self-incrimination (see pp. 424-425, 288 N.Y.S.2d 462, 235 N.E.2d 439; see, also, *Matter of Barnes*, 204 N.Y. 108, 125, 97 N.E. 508; *People v. McAdoo*, 45 Misc.2d 664, 667, 257 N.Y.S.2d 763, 768, affd. 51 Misc.2d 263, 272 N.Y.S.2d 412, cert. den. 386 U.S. 1031, 87 S.Ct. 1479, 18 L.Ed.2d 592, *supra*). "Legal" could also refer to questions concededly not based upon tainting illegal sources (see, e.g., U.S. Code, tit. 18, § 2515; *People v. Einhorn*, 35 N.Y.2d 948, 365 N.Y.S.2d 171, 324 N.E.2d 551).

It must be considered highly doubtful that the cryptic and conditional last sentence quoted above was intended to extend the traditional definition of "legal interrogatory" contained in the preceding language into a kind of built-in exclusionary rule which makes issues of constitutional admissibility a statutory element. To do so would be an unprecedented departure from all previous thinking on the subject. In an earlier opinion in the same case (*People v. Ianniello*, 21 N.Y.2d 418, 288 N.Y.S.2d 462, 235 N.E.2d 439), the Court held that questions which violated a Grand Jury witness' Fifth Amendment rights gave the witness the remedy of suppression in a prosecution for a previously committed substantive crime but did not endow him with a license to commit perjury or contempt "particularly when

* * * the contempt involves answers 'so false and evasive as to be the equivalent to no answer at all' " (21 N.Y.2d at p. 423, 288 N.Y.S.2d at 466, 235 N.E.2d at 442). And in *People v. DeSalvo*, 32 N.Y.2d 12, 343 N.Y.S.2d 65, 295 N.E.2d 750, *supra*, the Court obviously viewed the "taint" question as one of constitutional admissibility when it held that the defendant was properly convicted of contempt after he had forfeited his Fourth Amendment claim by not raising it until he had received immunity. It is apparent, then, that the Court's citation of section 2515 and the *Einhorn* case indicate that questions based on unauthorized eavesdropping, which, as has been seen, a Grand Jury witness need never answer, are not "legal" interrogatories under the contempt statute, while questions based upon evidence that is suppressible at trial are "legal", though subject to the remedy of exclusion where appropriate (*United States v. Calandra*, *supra*).

Defendant's contention that the questions asked of him were not "legal" also falls with the realization that contumacious evasion is usually (as is the allegation here) a course of conduct made up of a series of unresponsive, elusive or equivocal answers. Thus, the tainted source of the first question may be said to dissipate as the evasion builds toward contempt.

For the foregoing reasons, defendant's motion to suppress his Grand Jury testimony and dismiss the indictment is denied.

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

18 U.S.C. § 2515

Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information

would be in violation of this chapter.

New York Penal Law § 215.51
Criminal contempt in the first degree

A person is guilty of criminal contempt in the first degree when he contumaciously and unlawfully refuses to be sworn as a witness before a grand jury, or, when after having been sworn as a witness, before a grand jury, he refuses to answer any legal and proper interrogatory. Criminal contempt in the first degree is a class E felony.

New York Civil Practice Law and Rules § 4506
Eavesdropping evidence; admissibility; motion to suppress in certain cases

1. The contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping as defined by section 250.50 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court or grand jury. . . .

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1197

EDWARD McGRATH,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
Introduction	2
Petitioner is called before a grand jury and challenges the basis for the inquiry	3
Petitioner returns to the grand jury, lies while under oath, and is indicted for criminal contempt	5
Petitioner unsuccessfully moves to suppress his grand jury testimony	7
Petitioner is convicted after trial	7
Petitioner is granted a new trial during his state court appeal	8
Point—The Court lacks jurisdiction to review this case because the judgment of the Court of Appeals is not "final" within the meaning of 28 U.S.C. §1257. In any event, the issue raised by petitioner does not warrant consideration by this Court	10
Conclusion	14

TABLE OF AUTHORITIES

PAGE

Cases:

Bryson v. United States, 396 U.S. 64 (1969) 13

Cox Broadcasting Company v. Cohn, 420 U.S. 469 (1975) 11

Dennis v. United States, 384 U.S. 855 (1966) 13

Gelbard v. United States, 408 U.S. 41 (1972) 5, 11, 12
Gold v. Menna, Matter of, 25 N.Y.2d 475, 307 N.Y.S.2d 33 (1969) 4

Kastigar v. United States, 406 U.S. 441 (1972) 4
Kay v. United States, 303 U.S. 1 (1938) 13

Market Street Railway Co. v. Railroad Commission of the State of California, 324 U.S. 548 (1945) 10
McGrath v. People of the State of New York, 258 So.2d 291 (Fla. Dist. Ct. App.), *cert. denied*, 263 So.2d 833 (Fla. 1972) 3

People v. McGrath, 46 N.Y.2d 12 (1978) 2, 9
People v. McGrath, 57 A.D.2d 405, 394 N.Y.S.2d 855 (1st Dept. 1977) 1, 8
People v. McGrath, 86 Misc.2d 249, 380 N.Y.S.2d 976 (Sup. Ct. N.Y. Co. 1976) 7
People v. Munger, 37 A.D.2d 950, 326 N.Y.S.2d 212 (1st Dept. 1971), *appeal dism'd*, 33 N.Y.2d 576, 347 N.Y.S.2d 449 (1973) 13
People v. Townes, 41 N.Y.2d 97, 390 N.Y.S.2d 893 (1976) 12
People ex rel. Valenti v. McCloskey, 6 N.Y.2d 390, 189 N.Y.S.2d 898 (1959), *appeal dism'd*, 361 U.S. 534 (1960) 4
Persico, In re, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974) 5, 11

PAGE

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 10

United States v. Appel, 211 F. 495 (S.D.N.Y. 1913) ..... 6n.
United States v. Calandra, 414 U.S. 338 (1974) 5
United States v. Callahan, 439 F.2d 852 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971) 2
United States v. Ceccolini, 435 U.S. 268 (1978) 12
United States v. Kapp, 302 U.S. 214 (1937) 13
United States v. Knox, 396 U.S. 77 (1969) 13
United States v. Mandujano, 425 U.S. 564 (1976) 13
United States v. Morales, 566 F.2d 402 (2d Cir. 1977) 8
United States v. Perdiz, 256 F. Supp. 805 (S.D.N.Y. 1966) 12
United States v. Scios, 23 Crim. L. Rptr. 2424 (D.C. Cir. 1978) (en banc) ..... 13n.
United States v. Wong, 431 U.S. 174 (1977) 13

Wong Sun v. United States, 371 U.S. 471 (1963) 12

Other Authorities:

N.Y. Criminal Procedure Law §50.10 4
N.Y. Criminal Procedure Law §190.35 4
N.Y. Criminal Procedure Law §190.40 4
18 U.S.C. §2515 ..... 12n.
28 U.S.C. §1257 10
S. Rep. 1097, 90th Cong., 2d Sess., U.S. Code Cong. & Adm. News 2112 (1968) ..... 12n.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

On July 19, 1976, petitioner was convicted after a jury trial in the Supreme Court, New York County, of Criminal Contempt in the First Degree (N.Y. Penal Law §215.51). He was sentenced on September 20, 1976, to a nine-month prison term. On May 31, 1977, the Appellate Division of the New York Supreme Court reversed the judgment of conviction against petitioner and ordered that the indictment against him be dismissed (*People* v. *McGrath,* 57 A.D. 2d 405, 394 N.Y.S. 2d 885 [1st Dept. 1977]). Upon

further appeal by the People, the New York Court of Appeals on November 30, 1978, reversed that portion of the Appellate Division order that dismissed the indictment, but ordered that the case be remitted to the Supreme Court, New York County, for a new trial (*People* v. *McGrath*, 46 N.Y. 2d 12 [1978]). That trial has been postponed pending a decision from this Court on the instant petition. Petitioner has been at liberty since his indictment, and is presently on bail pending the outcome of the new trial.

STATEMENT OF THE CASE

Introduction

On December 21, 1964, one Thomas Callahan and several accomplices robbed a bank truck in Patterson, New Jersey, and escaped with more than $500,000. See *United States* v. *Callahan*, 439 F. 2d 852 (2d Cir.), *cert. denied*, 404 U.S. 826 (1971). One of the co-conspirators, Charles Roberts, subsequently elected to cooperate with the federal authorities. Before Callahan could be brought to justice, two unsuccessful attempts were made on Roberts' life. On the first occasion Roberts was shot in the chest. Later, his automobile was blown up; Roberts lost a leg, and his right arm was crippled for life. See *United States* v. *Callahan*, *supra*, at 859-60.

In 1969 the New York County District Attorney investigated the activities of petitioner's friend Hugh Mulligan to determine, in part, whether Mulligan and others had entered into a conspiracy to assist Callahan by making a third attempt on Roberts' life. In the course of the investigation, the District Attorney's investigators obtained 13 judicial

orders authorizing the use of electronic surveillance against Mulligan and others. They learned that petitioner, who lived in Florida, intended to visit Mulligan in New York early in September, 1969 (Affidavit of September 3, 1969, in support of an eavesdropping warrant, at 5, 6). During petitioner's stay in New York, physical surveillance was conducted of his activities. Petitioner spent several hours alone with Mulligan in Mulligan's car (Affidavit of October 2, 1969, in support of an eavesdropping warrant, at 3).

No electronic surveillance was conducted of the conversation between petitioner and Mulligan. However, on September 11 and September 12, 1969, the District Attorney's investigators intercepted conversations between Mulligan and a confederate (*id.*, at 3). In those conversations Mulligan stated that he had talked with petitioner about a plan to murder Charles Roberts, and that petitioner had offered to "whack [Roberts] up" himself (*id.*, at 8).

Petitioner is called before a grand jury and challenges the basis for the inquiry.

Petitioner was thereafter subpoenaed by a New York County grand jury investigating the activities of Mulligan and his associates. Petitioner resisted the subpoena for an extended period of time (523).* See *McGrath* v. *People of the State of New York*, 258 So.2d 291 (Fla. Dist. Ct. App.), *cert. denied*, 263 So.2d 833 (Fla. 1972). Finally, on February 20, 1973, petitioner appeared before the Third New York County Grand Jury for the February 1973 Term.

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* Subsequent numerical references and references followed by "a" refer to pages in the record on appeal in the Appellate Division of the New York Supreme Court.

Under New York law a witness who testifies before a grand jury without executing a waiver of immunity automatically receives "transactional" immunity. *See* N.Y. C.P.L. §§50.10, 190.35, 190.40. That immunity bars any prosecution of the witness for any matter about which he has testified, whether or not such prosecution would be based on the testimony, and is thus broader than the immunity which the Constitution requires. *Compare Kastigar* v. *United States,* 406 U.S. 441, 453 (1972) *with Matter of Gold* v. *Menna,* 25 N.Y. 2d 475, 481, 307 N.Y.S. 2d 33, 37 (1969). However, a witness who refuses to answer questions in the grand jury does not receive immunity and may be prosecuted, for criminal contempt. Moreover, a witness who does answer, but lies to the grand jury, may be prosecuted either for perjury or for criminal contempt, depending on the nature of his false answers. N.Y. C.P.L. §50.10. See, *e.g., People ex rel. Valenti* v. *McCloskey,* 6 N.Y.2d 390, 189 N.Y.S.2d 898 (1959), *appeal dism'd,* 361 U.S. 534 (1960).

When petitioner appeared before the grand jury, he was told by an Assistant District Attorney that the grand jury was investigating whether certain persons had conspired in New York County to commit the crimes of murder and assault. Petitioner was instructed that he would receive transactional immunity in return for his testimony. The Assistant District Attorney also explained that the grant of immunity meant petitioner's testimony could expose him to criminal liability only if he committed perjury or criminal contempt (4, 6-9).

Petitioner then inquired whether he would be asked any questions based on information derived from electronic surveillance (11). The Assistant District Attorney replied affirmatively (13), and petitioner and his attorney were taken immediately to a judge of the New York County Supreme Court. Petitioner contended that he was entitled to a full hearing on the legality of the electronic surveillance from which questions were to be derived (16a-17a). The judge ruled, however, that petitioner was entitled only to have the court examine the judicial orders authorizing the electronic surveillance (23a). The judge then examined the orders which had authorized electronic surveillance against Mulligan and found that each order "appear[ed] on its face to be valid" (24a). Petitioner was directed to return to the grand jury and answer legal and proper questions (25a-26a). The propriety of that direction is not challenged here. When petitioner was granted the hearing limited to a determination of the facial validity of the court orders, he received precisely that to which he was entitled by New York and federal law. As he apparently concedes now, he was not entitled to a full-scale suppression hearing before answering. Petition at 5-6. See *Gelbard* v. *United States,* 408 U.S. 41, 70 (White, J., concurring) (1972); *In re Persico,* 491 F.2d 1156 (2d Cir.), *cert. denied,* 419 U.S. 924 (1974). See also *United States* v. *Calandra,* 414 U.S. 338, 349-50 (1974).

Petitioner returns to the grand jury, lies while under oath, and is indicted for criminal contempt.

On February 22, 1973, petitioner again appeared before the grand jury, and again was told that he had been accorded transactional immunity (19-22). Petitioner was questioned about his relationships with Hugh Mulligan and

with Callahan, the subject of the federal robbery prosecution. Petitioner testified that he and Mulligan met in 1955 (45-47). Mulligan introduced petitioner to Callahan in 1969, and Callahan visited petitioner in Florida on two or three subsequent occasions (42-43, 54). Petitioner visited Mulligan in New York City in September 1969, and spent a substantial amount of time in Mulligan's car during that visit (55-58, 67).

The Assistant District Attorney then asked whether petitioner and Mulligan had on that occasion discussed Callahan's robbery prosecution and a plot to murder the witness, Charles Roberts. Although petitioner recalled, in minute detail, the other events of his visit to New York, he repeatedly maintained that he could not remember whether he and Mulligan discussed killing Charles Roberts (59-64). He persisted in so testifying even after he was warned that under New York law [as under federal law*] a witness who attempts to impede a grand jury investigation with patent lies about a failure of memory can, like the witness who refuses to give testimony at all, be prosecuted for criminal contempt (64-65, 68-70).

On May 4, 1973, the grand jury indicted petitioner for Criminal Contempt in the First Degree, for giving patently false answers when asked whether Mulligan told him that Callahan planned to kill Charles Roberts. N.Y. Co. Indictment No. 2416/73.

* See, *e.g.*, *United States* v. *Appel*, 211 F. 495 (S.D.N.Y. 1913).

Petitioner unsuccessfully moves to suppress his grand jury testimony.

Petitioner first presented the question he raises in this Court in a suppression motion brought before trial. Petitioner moved to exclude from evidence the questions and answers that underlay the criminal contempt indictment, arguing that the questions were the product of illegal eavesdropping.

Justice Burton Roberts, who heard the motion, found there was "little doubt" of the good faith of the District Attorney's investigators. He also found, however, that the first of the 13 orders authorizing eavesdropping on Mulligan had been based on an inadequate demonstration of probable cause, and that all subsequent orders were invalid as the fruit of the original invalid surveillance (*People* v. *McGrath*, 86 Misc. 2d 249, 251-52, 380 N.Y.S. 2d 976, 980 [Sup. Ct. N.Y. Co. 1976]). Justice Roberts nevertheless ruled that petitioner's grand jury testimony was admissible. He agreed with the People that petitioner's decision to lie was independent criminal conduct that dissipated the taint of any illegal eavesdropping (*People* v. *McGrath*, *supra*, 86 Misc.2d at 257, 380 N.Y.S. 2d at 985).

Petitioner is convicted after trial.

Under state law the proof of the criminal contempt in a case like petitioner's is limited to proof of the questions and answers before the grand jury. Accordingly, at trial the People introduced the minutes of petitioner's testimony before the grand jury. Petitioner's motion to redact certain portions, as too prejudicial, was denied. The defense presented no evidence.

On July 19, 1976, petitioner was found guilty by the jury of Criminal Contempt in the First Degree.

Petitioner is granted a new trial during his state court appeal.

The Appellate Division reversed petitioner's conviction and ordered that the indictment be dismissed. *People* v. *McGrath,* 57 A.D.2d 405, 394 N.Y.S.2d 885 (1st Dept. 1977). The court agreed with petitioner that taint from illegal eavesdropping is not attenuated by a witness' decision to give false answers, and concluded that petitioner's testimony before the grand jury should have been suppressed. The court also noted that a reversal of the conviction and a new trial would in any event have been necessary because some of the questions and answers (concerning petitioner's contact with racketeers) should have been redacted.

On appeal to the Court of Appeals, the People first argued that under the relevant New York and federal statutes, a grand jury witness who has been permitted to challenge the facial validity of eavesdropping orders during grand jury proceedings has no further suppression remedy. If after his challenge is heard he disobeys an order to respond truthfully to questions, and as a result is charged with a testimonial crime, he may not move to suppress his testimony. This is the rule which has been adopted by the Second Circuit. *United States* v. *Morales,* 566 F.2d 402 (2d Cir. 1977). Second, the People argued that even if petitioner was entitled to make a motion to suppress, the motion was properly denied because, instead of refusing to answer, he made an independent voluntary choice to lie.

The Court of Appeals reversed the order of the Appellate Division. The Court rejected the People's first argument and held, contrary to the rule in *Morales,* that petitioner could move to suppress his grand jury testimony. However, the Court agreed with the People that the illegality of eavesdropping could provide a defense only to a witness charged with refusing to testify. The witness who has lied to the grand jury, and who as a result is charged with criminal contempt or perjury, may not raise as a defense the illegal wiretap. By his own voluntary and independent criminal action before the grand jury, such a witness has dissipated the taint of illegal police conduct. *People* v. *McGrath,* 46 N.Y. 2d 12, 29 (1978).

The Court of Appeals also held, however, that the Appellate Division had correctly determined that the whole of petitioner's grand jury testimony, including testimony about prejudicial matters, should not have been placed in evidence at his trial. Thus, while the Court reversed the order of the Appellate Division suppressing petitioner's grand jury testimony, the Court nevertheless remitted petitioner's case for a new trial in the Supreme Court, New York County.

Petitioner's new trial on the indictment has been postponed pending a decision from this Court on the instant petition.

POINT

The Court lacks jurisdiction to review this case because the judgment of the Court of Appeals is not "final" within the meaning of 28 U.S.C. §1257. In any event, the issue raised by petitioner does not warrant consideration by this Court.

1. Under 28 U.S.C. §1257, this Court has jurisdiction to review the decision of the Court of Appeals only if that decision is "final"—that is, only if it marks an effective end to the entire litigation and not merely to an intermediate or interlocutory stage of the litigation. *Market Street Railway Company* v. *Railroad Commission of the State of California,* 324 U.S. 548, 551 (1945). The finality rule, in force since 1789, serves to protect the resources of the Court and of the litigants. In addition, when one of the litigants seeks to overturn a decision of a state court, the requirement of finality is "an important factor in the smooth working of our federal system." *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 124 (1945).

The New York Court of Appeals has not entered a "final" judgment within the meaning of 28 U.S.C. §1257. On an issue of state law the Court of Appeals remitted petitioner's case for a new trial. Petitioner thus is subject neither to a judgment of conviction nor to a sentence of fine or imprisonment. Like any other defendant indicted in a state court, petitioner faces only an obligation to defend himself from the charges contained in the indictment. If petitioner is convicted at the second trial, he will thereafter be able to present his claim to this Court after appealing

his conviction in the state courts. Of course, if petitioner is acquitted the issue here raised will be moot.

There is no good reason for this Court to hear this case before the adjudication of guilt or innocence. See *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975). The problem addressed by the Court of Appeals' opinion is not so pressing that it requires this Court's immediate attention. Indeed, as far as we are aware, the opinion below is the first and only reported decision dealing with the question of whether a witness who lies in the grand jury may move to suppress his false testimony on the ground that the questions were based on illegal wiretapping. If in the future the issue raised in the Court of Appeals' decision engenders more litigation, this Court will at that time be able to deal with the issue in a case that is ripe for review.

2. The rule in *Gelbard* v. *United States,* 408 U.S. 41 (1972), upon which petitioner relies, is not at issue here. In *Gelbard,* the witnesses alleged that questions put to them in the grand jury were based on illegal eavesdropping. On this ground, they refused to answer. Civil contempt charges were immediately brought against the witnesses. This Court found the witnesses had a defense because, in the procedural posture of the case, the Court "assume[d]" that the eavesdropping was not done pursuant to court orders. 408 U.S. at 47. See also *id.,* at 61 n.22. By contrast, in petitioner's case the judge supervising the grand jury was shown the eavesdropping orders, inspected them, and found them facially valid. In these much different circumstances, a witness has no defense under *Gelbard.* See *id.,* at 70 (White, J., concurring). See also, *e.g., In re Persico,* 491 F.2d 1156 (2d Cir.), *cert. denied,* 419 U.S. 924 (1974).

More importantly, however, petitioner, unlike the witnesses in *Gelbard*, chose to testify and then lied to the grand jury. Because petitioner thereby committed an independent criminal act, the admissibility of his false grand jury testimony must be determined under the familiar principles of attenuation enunciated by this Court in many cases. See, *e.g.*, *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Wong Sun* v. *United States*, 371 U.S. 471 (1963).* Those principles clearly dictate the result reached by the Court of Appeals below.

When a person commits an unlawful act independent of illegal police conduct—for example, when he shoots at or attempts to bribe an officer executing an illegal search or making an illegal arrest—that person cannot excuse his crime or have evidence of the crime suppressed even though his act was occasioned by the police conduct. See, *e.g.*, *United States* v. *Perdiz*, 256 F. Supp. 805 (S.D.N.Y. 1966); *People* v. *Townes*, 41 N.Y.2d 97, 102, 390 N.Y.S.2d

* 18 U.S.C. §2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury * * * of the United Sattes, a State, or a political subdivision thereof if the disclosure of that information would be in violation of [Title III].

Despite petitioner's contention to the contrary (Petition at 5), this section does not alter, in eavesdropping cases, the rule that an independent criminal act attenuates the taint of prior illegal conduct. Indeed, the Senate Report accompanying Title III explicitly states that by enacting section 2515, Congress had

> no intention to change the attenuation rule. See *Nardone* v. *United States*, 127 F.2d 521 (2d), certiorari denied, 316 U.S. 698 (1942); *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role [sic] beyond present search and seizure law. See *Walder* v. *United States*, 347 U.S. 62 (1954). S. Rep. 1097, 90th Cong., 2d Sess. 106, U.S. Code Cong. & Admn. News, 2112, 2185 (1968).

893, 897 (1976); *People* v. *Munger*, 37 A.D.2d 950, 326 N.Y.S.2d 212 (1st Dept. 1971), *appeal dism'd*, 33 N.Y.2d 576, 347 N.Y.S.2d 449 (1973). The same principles apply to testimonial crimes, whether committed in the grand jury or elsewhere. The government may not have the right to ask certain questions or may ask questions in an illegal manner. In such cases, a witness may, in some circumstances, avoid answering, even after he has sworn to tell the truth. However, in no circumstances will a witness be permitted to lie. As Mr. Justice Harlan said for the Court in *Bryson* v. *United States*, 396 U.S. 64, 72 (1969):

> [I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.

This same rule has been followed consistently. See, *e.g.*, *United States* v. *Wong*, 431 U.S. 174 (1977); *United States* v. *Mandujano*, 425 U.S. 564 (1976); *United States* v. *Knox*, 396 U.S. 77 (1969); *Dennis* v. *United States*, 384 U.S. 855 (1966); *Kay* v. *United States*, 303 U.S. 1 (1938); *United States* v. *Kapp*, 302 U.S. 214 (1937). Petitioner has cited no case to the contrary; in fact, as far as we know, there is none.* There is no warrant for review by this Court of this familiar principle of law.

* *United States* v. *Scios*, 23 Crim. L. Rep. 2424 (D.C. Cir. 1978) (en banc), cited by petitioner, is inapposite. There, a witness against Scios had been discovered as a result of an illegal search of a file

(footnote continued on next page)

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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folder in Scios' residence. The witness later had refused to testify before a grand jury until he had been ordered to do so. The Court of Appeals found, under those circumstances, no independent conduct that would attenuate the taint of the illegal search and permit the use of the witness' testimony at Scios' upcoming trial. But of course there the prospective testimony was not, like petitioner's grand jury testimony, the product of the defendant's own criminal act independent of the illegal police conduct.